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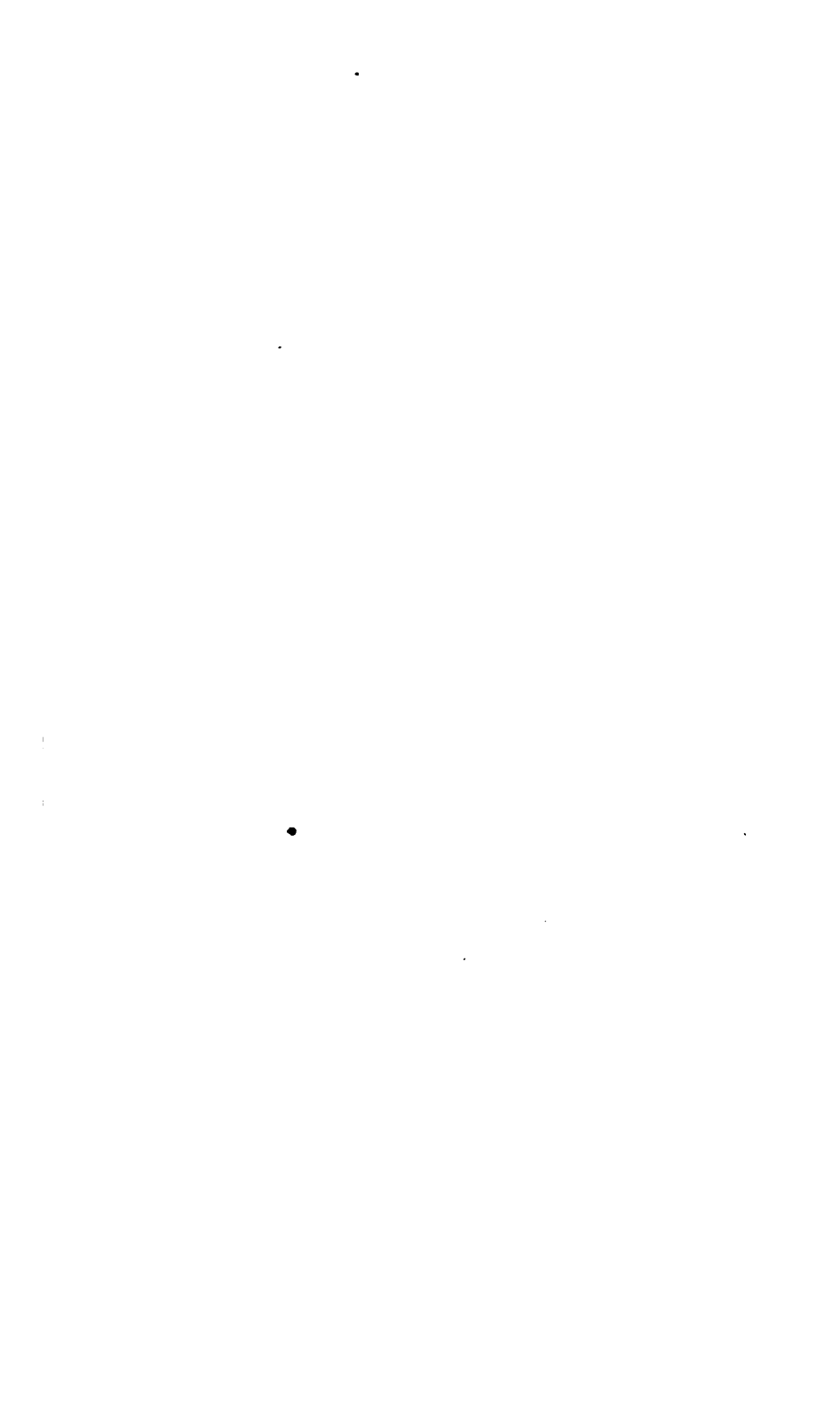
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A
DIGEST
OF THE
LAW OF EVIDENCE
ON THE TRIAL OF
Actions at Nisi Prius.

BY
HENRY ROSCOE, ESQ.
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

SIXTH EDITION,
WITH CONSIDERABLE ADDITIONS,
BY EDWARD SMIRKE, ESQ.
BARRISTER-AT-LAW.

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PART of the following work was printed before the passing of the late Act, 6 & 7 Vict. c. 85., which has removed the incompetency of witnesses in many instances, and has consequently altered the law as laid down in some of the cases digested and retained in this edition. The Act has been printed in the Appendix, and the reader will therefore easily be able to see the extent to which such cases have become inapplicable to actions commenced since 22d August, 1843.



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A

D I G E S T,

&c.

IN forming a digest of the general rules of evidence, the subject may be considered with regard, first, to the *nature* of evidence; secondly, to the *object* of evidence; thirdly, to the *proof of documents*; fourthly, to *proof by witnesses*; and fifthly, to the *effect* of evidence.

NATURE OF EVIDENCE.

With regard to its nature, evidence may be considered under the following heads. — Primary or secondary evidence; presumptive evidence; hearsay; admissions.

PRIMARY EVIDENCE.

It is a general rule, that the best, or rather the highest, evidence must be given that the nature of the case admits. *B. N. P.* 293. Thus, where a will of lands is to be proved, the primary evidence of it is the will itself, and the probate is not admissible; for the ecclesiastical court has no cognizance of realty. *Id.* 246. So in general where a contract has been reduced into writing by the parties, the writing is the best evidence of it, and must be produced. But it is not in every case necessary, where the matter to be proved has been committed to writing, that the writing should be produced. If the narrative of an extrinsic fact has been committed to writing, it may yet be proved by parol evidence. Upon this principle, a receipt for money will not exclude parol evidence of the payment. *Rambert v. Cohen*, 4 *Esp.* 213. So where, in trover, the witness stated that he had verbally required the defendant to deliver up the property, and at the same time served upon him a notice in writing to the same effect, Lord Ellenborough ruled that it was not necessary that the writing should be produced. *Smith v. Young*, 1 *Camp.* 439. In the same manner what a party says, admitting a debt, is evidence; notwithstanding the promise to pay is reduced into writing. *Singleton v. Barrett*, 2 *C. & J.* 369. So where the fact to be proved was, that a certain person occupied land so as to gain a settlement by 13 & 14 *Car. 2.*, it was held that, although there was a written demise, the fact might be proved by parol. *R. v. Inhab. of Holy Trinity*, 7 *B. & C.* 611. *S. C.* 1 *M. & R.* 444. But the parties to the contract, the amount of rent, and the terms of the tenancy, can only be shown by the writing. *S. C.* and *Strother v. Barr*, 5 *Bing.* 136. Thus tenancy at

a certain rent, and for a certain period, so as to gain a settlement under 6 Geo. 4. c. 57., cannot be proved by parol, if there was a written agreement: *R. v. Merthyr Tydvil*, 1 B. & Ad. 29. So the fact of a tenancy under a particular person cannot be so proved, where there is a writing. *Doe v. Harvey*, 8 Bing. 239. Although there exists a deed of partnership, yet the fact of partnership may be proved by the acts of the parties. *Alderson v. Clay*, 1 Stark. 405. Where it is necessary to prove the fact of a marriage, the entry in the parish register is not the only evidence; but the fact may be proved by the testimony of persons who were present and witnessed the ceremony, or by general reputation. *Evans v. Morgan*, 2 C. & J. 453. See *post*, *Trespass for Crim. Con.* On an indictment for an unlawful assembly, the inscriptions and devices on banners displayed at a public meeting may be proved by parol, and it is not necessary to produce the banners themselves. *R. v. Hunt*, 3 B. & A. 566. And the transactions and proceedings of such meeting may be proved by parol, as in the case of resolutions entered into; although it should appear that those resolutions were read from a written or printed paper. *Id.* 568. So an inscription on a monument, or writing on a wall, may be proved by parol. *Mortimer v. McCallan*, 6 M. & W. 68. 72. When, in order to prove a partnership between *Didot* and *Foudrinier*, whose assignees were plaintiffs in the suit, a witness was asked by defendant whether he had not heard *Foudrinier* say, that by a deed between him and *Didot* an interest belonged to *Didot*, *Abbott, C. J.*, was of opinion that no such question could be asked without the production of the instrument, or accounting for its non-production. *Bloxam v. Elsie*, R. & M. 187. But this case appears to be overruled by *Slatterie v. Pooley*, 6 M. & W. 664., where it was decided that parol admissions are evidence against the party making them, although they may relate to the contents of a written instrument. See also *Neuhall v. Holt*, 6 M. & W. 662. S. P.; and *post*, tit. *Admissions*.

The proper evidence of all judicial proceedings is the production of the proceedings themselves, or of examined copies of them. *Thellusson v. Shedden*, 2 New R. 228. Thus parol evidence is not admissible of the day on which a cause came on to be tried; as it is capable of proof by matter of record, viz. the postea. *Thomas v. Ansley*, 6 Esp. 80. *Id.* 83. And where, to prove that the plaintiff had been discharged under the Insolvent Act, it was proposed to give in evidence his admission to that effect, Lord Ellenborough held it insufficient. *Scott v. Clare*, 3 Camp. 236.; but see *post*, p. 38. So parol evidence is not admissible to prove the taking of oaths required by the Toleration Act, which must appear by the records of the court where the oaths were taken. *R. v. Hube, Peake C.* 132. So where the deposition of a witness in a case of misdemeanor was taken under 7 Geo. 4. c. 64. s. 3., and the plaintiff in an action against the witness offered parol evidence of an admission made by him in such deposition, the court held such evidence to have been rightly rejected. *Leach v. Simpson*, 5 M. & W. 309.

The counterpart of a deed is admissible as original evidence against the party executing it and those claiming under him, though no notice to produce the other part has been given. *Burleigh v. Sibbs*, 5 T. R. 465. *Paul v. Meek*, 2 Y. & J. 116.

In general, parol evidence is esteemed secondary in its nature to written evidence. Thus, when an agreement has been reduced into writing, the writing must be produced; *Brewer v. Palmer*, 3 Esp. 213.

Fenn v. Griffith, 6 Bing. 533.; and, if not properly stamped, the plaintiff must be non-suited; unless the contents of the unstamped instrument are proved by the admissions of the party. *Slatterie v. Pooley*, 6 M. & W. 664. Again, where a charitable society entered in their book a resolution with regard to the employment of a secretary, and the plaintiff afterwards engaged with them as such upon the terms specified in the book, which was kept by him, it was held, in an action by him for work and labour, that he was bound to produce the book containing the resolution. *Whitford v. Tutin*, 10 Bing. 395., 4 Moo. & S. 166., S. C. But a mere memorandum, not signed by the parties nor intended to be final, will not prevent the introduction of parol evidence. *Doe v. Cartwright*, 3 B. & A. 326.; and see *Hawkins v. Warre*, 3 B. & C. 698. So where a verbal contract is made for the sale of goods, and is put into writing afterwards by the vendor's agent for the purpose of assisting his recollection, but not signed by the vendee, it may be proved by parol. *Dalison v. Stark*, 4 Esp. 163. So a vendee may give evidence of warranty, although a note of the sale and receipt of the money, given by the vendor to the vendee after the conclusion of a parol contract, contained no notice of any warranty. *Allen v. Pink*, 4 M. & W. 140. So of the memorandum of the terms of a lease not signed by the lessor, but only by the wife of the lessee. *R. v. St. Martin's Leicester*, 2 A. & E. 210. See also *R. v. Wrangle*, 2 A. & E. 514. These cases show that a mere unaccepted proposal, executory memorandum, private minute, or unauthorized entry, will not exclude oral proof. In order to render the production of a writing necessary, it must appear to relate to the matter in question. Thus where parol evidence is offered to prove a tenancy, it is not a valid objection that there is some written agreement relative to the holding, unless it also appears that the agreement was between the parties as landlord and tenant, and that it continues in force at the very time to which the parol evidence applies. *Doe v. Morris*, 12 East, 237. See *Stevens v. Penney*, 2 B. Moore, 349. But where, in ejectment, the plaintiff's witness proved an acknowledgment by the defendant that he held under T., and stated that he (the witness) had drawn an agreement touching the premises, between the plaintiff and T., it was held that the plaintiff was bound to produce the writing. *Fenn v. Griffith*, 6 Bing. 533. Parol evidence of the terms of a demise is admissible, although the witness, called to prove them, states that the lessor read them from some paper held in his hand at the time but which was not shown to, or signed by, the lessee. *Trewhitt v. Lambert*, 10 A. & E. 470.

If oral evidence of an agreement is given at a trial, the party desirous of excluding it may ask the witness in cross-examination whether it was not in writing; and may inquire as to the contents of the writing, in order to show that parol evidence is inadmissible. *Curtis v. Greated*, 1 A. & E. 167.

SECONDARY EVIDENCE.

Evidence of a kind inferior to primary, and which necessarily supposes better evidence behind, is called secondary evidence. Such secondary evidence is inadmissible unless a ground be laid for it by satisfactorily accounting for the absence of superior proof.

What ground must be laid for the introduction of secondary evidence.] Secondary evidence may be admitted, if it be proved that better evidence cannot be obtained. Thus in the case of a lost deed, the loss of the deed must be proved; and if two or more parts have been executed, the loss or destruction of all the parts should, it seems, be proved before other evidence can be received. *B. N. P.* 254. So where an instrument is in the possession of the opposite party, parol evidence of its contents may be given, on proof of the service of a notice to produce it. All the proper sources from which the primary evidence can be procured must be exhausted, before secondary evidence can be admitted. Thus the party who has the legal custody of an instrument must be applied to. *R. v. Stoke Golding*, 1 *B. & A.* 173. So where a letter, which had been in the possession of the defendant was filed in the Court of Chancery, pursuant to an order of that Court, it was ruled that secondary evidence of it was not admissible, it being in the power of either party to produce it on application to the court. *Williams v. Munnings*, *R. & M.* 18. The refusal of a third party to produce a document in his possession on subpoena will not let in parol evidence of it. *Jesus College v. Gibbs*, 1 *Y. & Coll.* 156. But where a document is in the hands of an attorney who is called to produce it, but declines to do so, relying upon his privilege or upon his lien, secondary evidence of its contents may be given. *Murston v. Downes*, 1 *A. & E.* 31. *Doe v. Ross*, 7 *M. & W.* 102. In the last case, it was suggested by the court that, where the attorney refuses on the ground of privilege, it may perhaps be necessary to shew that his client also objects to the production.

Proof of loss.] Where secondary evidence is offered in consequence of the loss of the primary evidence, it must be shown, in order to establish the loss, that diligent search has been made in those quarters from which the primary evidence was likely to be procured. Where the publisher of a paper, in which a libel had appeared, stated that he believed the original was either destroyed or lost, having been thrown aside as useless, this was held sufficient to let in secondary evidence. *R. v. Johnson*, 7 *East*, 66. So where a license to trade had been returned to the secretary of the governor who had granted it, and the secretary swore that it was his custom to destroy or put aside such licenses amongst the waste papers of his office as of no further use, and that he supposed he had disposed of the license in question in the same manner as other licenses; that he had searched for it, but did not recollect whether he had found it or not, though he did not think he had found it, the court held the loss sufficiently proved. *Kensington v. Inghis*, 8 *East*, 278. So where it became necessary to account for the non-production of a policy, and it was proved that it had been effected about seven years before, and, having become useless on account of a second policy being effected, had probably been returned to the plaintiff; and the clerk of the plaintiff's attorney, a few days before the trial of the action, searched for it in the plaintiff's house, not only in every place pointed out by the plaintiff, but in every place which he thought likely to contain a paper of this description, the search was held to be sufficient. *Brewster v. Sewell*, 3 *B. & A.* 296. So in a settlement case, where it was proved that one part only of an indenture had been executed, that the pauper and master were both dead at the time of trial, and that an inquiry for it had been made of the pauper shortly before

his death, who said that the indenture had been given up to him after the expiration of the apprenticeship, and that he had burnt it; and that an inquiry had also been made of the daughter and sole executrix of the master, who said she knew nothing about it, it was held that a sufficient inquiry had been made to render parol evidence of the contents admissible. *R. v. Morton*, 4 M. & S. 48. See *R. v. Piddlehinton*, 3 B. & Ad. 460. But where the only evidence of loss consisted of the declarations of the deceased pauper, who stated that the indenture had been given back to him and worn out, held that parol evidence was inadmissible. *R. v. Rawden*, 2 A. & E. 156. And where the party, in whose possession the instrument was, is alive, he ought to be called, and his declarations are not admissible. *R. v. Denio*, 7 B. & C. 620. Thus where, in another settlement case, it appeared that there were two parts of an indenture, one of which had been destroyed, and the other delivered to Miss T. to whom the pauper had been assigned, and that application had been made to Miss T. (who was not called) who said she could not find the indenture, and did not know where it was, this search was held to be insufficient. *R. v. Castleton*, 6 T. R. 236. Where the loss or destruction of the paper is probable, very slight evidence of its loss or destruction is sufficient. *Per Abbott, C. J., Brewster v. Sewell*, 3 B. & A. 296. Thus where depositions have been delivered to the clerk of the peace or his deputy, it appearing that on the bill being thrown out the practice is to throw away the depositions as useless, slight evidence of a search for them is sufficient; and the deputy need not be called, it being his duty to deliver them to his principal. *Freeman v. Arkell*, 2 B. & C. 496. Where a constable, who levied under a warrant issued by the defendant and was entitled to the custody of it, said that he had deposited it in his office, but was unable, upon search, to find it, held that secondary evidence of it was admissible against the defendant, though no notice to produce was served on him. *Fernley v. Worthington*, 1 M. & G. 491. The degree of diligence to be used in searching for a deed must depend on the importance of the deed, and the particular circumstances of the case. *Per Cur. in Gully v. Bishop of Exeter*, 4 Bing. 298. The presumption is, that a useless instrument would be destroyed. *Per Bayley, J., R. v. East Fairley*, 6 D. & R. 153. Where it was the duty of the party in possession of a document to deposit it in a particular place, and it is not found in that place, the presumption is that it is lost or destroyed. Thus a fruitless search in the parish chest for indentures given up to the parish officers long ago is sufficient to let in parol evidence of them. *R. v. Stourbridge*, 8 B. & C. 96., 2 M. & R. 43., S. C. So where a will is not forthcoming, if it was in the custody and power of the testator, or rather unless it appears that it was not in his custody or power, the presumption of law is, that it was destroyed by him. *Wargent v. Hollings*, 4 Hagg. Eccl. R. 249.

The objection that secondary evidence of a document is offered, without proof of due search for the original, must be distinctly made at the trial; otherwise the court will not entertain it on a motion for a new trial. *Williams v. Wilcox*, 8 A. & E. 314.

Notice to produce, when necessary.] In general, when any written instrument is in the possession of the opposite party, secondary evidence of its contents is inadmissible, without previous proof of a notice to

produce the original. But where, from the nature of the proceedings, the party in possession of the instrument has notice that he is to be charged with the possession of it, as in the case of trover for a bond, a notice to produce is unnecessary. *How v. Hall*, 14 East, 274. *Scott v. Jones*, 4 Taunt. 865. And the plaintiff may prove the nature and description of the document, for which trover is brought, by secondary evidence, though the defendant offers to produce it, for it is part of the defendant's evidence. *Whitehead v. Scott*, 1 M. & Rob. 2. So a notice is not required where the party has procured the possession of the instrument by fraud, after the action commenced, from a witness called for the purpose of producing it under a *subpoena duces tecum*. *Leeds v. Cook*, 4 Esp. 256. A counterpart executed by defendant may be read by the plaintiff without a notice to produce the original. *Burleigh v. Stibbs*, 5 T. R. 465. In an action for seaman's wages, secondary evidence of the ship's articles is admissible under stat. 2 G. 2. c. 36. s. 8., without any notice to produce them. *Bowman v. Manzelman*, 2 Camp. 315. Notice to produce a notice is not generally requisite. *Kine v. Beaumont*, 3 B. & B. 288. *Colling v. Treweek*, 6 B. & C. 398. Thus notice of dishonour may be shown by a duplicate, or copy, without previous notice to produce the original. *Swain v. Lewis*, 2 C. M. & R. 261. So of notice to quit, *per Bayley J.*, in *Colling v. Treweek*, *supra*. But this rule seems to hold only where the action is founded on the notice; thus, where it was to be shown that defendant had received notice of the dishonour of other bills besides the one sued on, an examined copy of such notice was held inadmissible for want of notice to produce it. *Lanauze v. Palmer*, M. & M. 31. A copy of an attorney's bill, duly signed and delivered to defendant, may be proved in a suit by the attorney for the amount, without notice to produce the original. *Colling v. Treweek*, *supra*. In trover against a sheriff for taking goods under a *fi. fa.*, plaintiff may give evidence of the defendant's warrant and its loss, without notice to produce it. *Minshall v. Lloyd*, 2 M. & W. 450. A party will not be allowed, either in an examination in chief or in a cross-examination, to inquire into the contents of a deed, merely because the opposite party has the original deed in his possession in court at the time of the trial; and the opposite party may object to parol evidence of the contents on account of his not having received a notice to produce the original. *Cook v. Hearn*, 1 M. & Rob. 201. *Doe v. Harvey*, 4 Burr. 2484. *Bate v. Kinsey*, 1 C. M. & R. 38. In ejectment, the defendant relied upon a will: on the cross-examination of one of his witnesses he stated, that about a fortnight after the execution of the will, a second will was prepared, which had come to the possession of the defendant. The plaintiff's counsel was not allowed to ask whether the latter paper was duly signed by three witnesses, and whether the testator had declared it to be his last will, no notice to produce it having been given. *Doe v. Morris*, 3 A. & E. 46.

Notice to produce; proof of possession of original.] In order to render a notice to produce available, it must be proved that the original instrument is in the hand of the opposite party or of some person in privity with him. The nature of this evidence must vary according to the nature of the instrument. Where it belongs exclusively to the party, slight evidence is sufficient to raise a presumption that it is in

his possession. Thus, where a solicitor proved that he had been employed by the defendant to solicit his certificate, and that looking at his entry of charges he had no doubt the certificate was allowed, this was held to be proof of the certificate having come to the defendant's hands. *Henry v. Leigh*, 3 Camp. 502. Where the instrument has been delivered to a third person, between whom and the party to the suit there exists a privity, notice to the latter is sufficient; as in an action against the owner of a vessel for goods supplied to the use of the vessel, a notice to the defendant to produce the order for the goods, which had been delivered to the captain by the defendant, is sufficient. *Baldney v. Ritchie*, 1 Stark. 338. So in an action against the sheriff, a notice to his attorney to produce a warrant which has been returned to the under-sheriff while the defendant was in office, is sufficient. *Taplin v. Atty*, 3 Bing. 164. So also notice to a defendant to produce a check drawn by him, and paid by his banker, is sufficient to entitle the plaintiff to give secondary evidence of its contents, although the check remains in the banker's hands. *Partridge v. Coates*, R. & M. 156. If the instrument was in possession of the party at the time of the service of notice, he cannot afterwards voluntarily part with it so as to get rid of the effect of the notice. *Dallas C. J.*, in *Knight v. Martin*, Gow. Rep. 104. But where the plaintiff was nonsuit in a cause in which he had given defendant notice to produce a lease, and afterwards defendant assigned the lease, and on a second trial plaintiff again gave defendant's attorney notice to produce it, and was then told by him of the assignment; it was held that secondary evidence was inadmissible. *Knight v. Martin*, Gow. Rep. 103. Where a paper had been delivered to a third person, under whom the defendant justified in an action of trespass, and by whose directions he acted, a notice to produce served upon the defendant was held not sufficient to authorize the admission of secondary evidence. *Evans v. Sweet*, R. & M. 83. But see *Pritchard v. Symonds*, B. N. P. 254. Where a document is in the hands of a person who holds it as stakeholder between the defendant and a third party, the notice to produce is not sufficient to let in secondary evidence; *Parry v. May*, 1 M. & Rob. 279.; for though it need not be shown that the document is in the actual possession of the party, it must be in the hands of some one who is bound to give up possession to him. *Ibid.* A judge's order on the plaintiff to admit a document to be a true copy of a letter written by him to defendant, will not authorize defendant to give the copy in evidence without proof that the plaintiff has the original in his possession, and has had a notice to produce it. *Sharpe v. Lamb*, 11 A. & E. 805.

The question whether there is sufficient proof of possession in the opposite party is solely for the judge; and where the notice to produce is given by the plaintiff, the defendant may interpose with evidence to disprove possession, and such evidence gives the plaintiff no reply to the jury. *Harvey v. Mitchell*, 2 M. & Rob. 366.

Notice to produce, form of.] A notice to produce may be by parol, and if both a written and parol notice have been given, proof of either is sufficient. *Smith v. Young*, 1 Camp. 440. A notice to produce a particular letter must specify the letter intended; to produce "all letters," is too general. *France v. Lucy*, R. & M. 341. *Jones v. Edwards*, M'C. & Y. 139. But a notice to produce "all letters written

by plaintiff to defendant relating to the matters in dispute in this action ;" *Jacob v. Lee*, 2 M. & Rob. 33. ; or "all letters written to, and received by, plaintiff between 1837 and 1841, both inclusive, by and from the defendants, or either of them, and all papers, &c. relating to the subject matter of this cause ;" *Morris v. Hauser*, 2 M. & Rob. 392. ; has been held sufficient to let in secondary evidence of a particular letter not otherwise specified. And in *Rogers v. Custance*, 2 M. & Rob. 179., in an action for work done, a notice to produce "all accounts, papers, and writings in any way relating to the matters in question in this cause," was held sufficient to let in evidence of a written account of the work done by the plaintiff, delivered to the defendant, and admitted by him to be correct ; and on moving for a new trial, the Court refused a rule on the above ground. If the title of the cause is mis-described in the notice, it will be bad ; as "A. assignee of B. and C. v. D." instead of "A. assignee of B. v. D." *Harvey v. Morgan*, 2 Stark. 19.

Notice to produce, service of, on whom.] In general it is sufficient (even in a *qui tam* action) to serve the notice to produce on the attorney or agent of the party. *Cates v. Winter*, 3 T. R. 306., 2 T. R. 203. (n). Indeed it seems more proper to do so, where there is an attorney. *Houseman v. Roberts*, 5 C. & P. 394. But notice duly served on the party is sufficient. *Hughes v. Budd*, 8 Dougl. P. C. 315. A notice to produce papers not necessarily connected with the cause, served on the attorney so late as to prevent the party (i. e. his client) from receiving it in time before the trial, is not good. *Vice v. Lady Anson*, M. & M. 96. Where the attorney has been changed, a notice to produce served on the first attorney, before the change, will entitle the party to call for production of the paper on the trial. *Doe v. Martin*, 1 M. & Rob. 242. It is sufficient to leave the notice with a servant of the party at his dwelling-house. *Evans v. Sweet*, R. & M. 83., per Best, C. J.

Notice to produce, time of service of.] The notice must appear to be a reasonable notice. Service of the notice upon the wife of the defendant's attorney in a town cause late in the evening before the trial, was ruled insufficient. *Doe v. Grey*, 1 Stark. 283. But notice to produce a letter, served on the attorney of the party on the evening next but one before the trial, was ruled to be sufficient, though the party was out of England ; the presumption being that, on going abroad, the party had left with his attorney the papers necessary for the conduct of the trial. *Bryan v. Wagstaff*, R. & M. 327. See also *Astalo v. Fourdrier*, M. & M. 335. (n). And a notice served on the tenth of April, the trial being on the fourteenth, was ruled to be sufficient to let in secondary evidence of letters written eighteen years back, and addressed to the defendant, a foreigner, at his residence abroad. *Drabble v. Donner*, R. & M. 47. A notice to produce certain deeds was served on an attorney in Essex on Saturday, Monday being the commission day : he went to London and fetched them. On Monday evening notice was given to produce another deed : the attorney said it was in London, but should be fetched if the party would pay the expense of the journey : no offer to pay was made ; the trial came on on Thursday : it was held that the party could not give secondary

evidence of the deed. *Doe v. Spitty*, 3 B. & Ad. 182. Notice served on the attorney, at his office, on the evening before the trial, at half-past seven P. M., was held insufficient to let in secondary evidence of a letter in his client's possession. *Byrne v. Harvey*, 2 M. & Rob. 89.

Notice to produce must in general be served before the commission day when parties are living away from the assize town; *Trist v. Johnson*, 1 M. & Rob. 259.; accord. *R. v. Ellicombe*, 1 M. & Rob. 260.; but there seems to be no inflexible rule as to time; for where both attorney and client lived in the assize town, a notice served two days before trial, though after the commission day, has been held sufficient; *Firkin v. Edwards*, 9 C. & P. 478.; and where a paper might be expected to be in the attorney's hands, a notice on him at his office the day before the trial of a town cause, may be good; *Gibbons v. Powell*, 9 C. & P. 634. A three days' notice was held sufficient in the case of letters written by the defendant to a person in New South Wales, where long litigation on the subject of them made it presumable that they had been remitted to the defendant in this country. *Sturge v. Buchanan*, 10 A. & E. 598. Service of a notice on Sunday is bad. *Hughes v. Budd*, 8 Dowl. P. C. 315.

Notice to produce, effect of.] If the party refuses to produce the papers required, such a circumstance is not of itself evidence against him; it merely entitles the other party to give secondary evidence. *Cooper v. Gibbons*, 3 Camp. 363. *Lawson v. Sherwood*, 1 Stark. 315. The refusal to produce them is however matter for observation to the jury. *Semb. Lyndhurst, C. B., Bale v. Kinsey*, 1 C. M. & R. 41. But see *Doe v. Whitehead*, 8 A. & E. 671. If the party, giving the notice, declines to use the papers when produced, this, though matter of observation, will not make them evidence for the adverse party; *Sayer v. Kitchen*, 1 Esp. 210.; though it is otherwise if the papers are inspected. *Wilson v. Bowie*, 1 C. & P. 10. and see 5 Esp. 235. Notice to produce papers will not entitle the party, who gives it, to cross-examine a witness as to their contents; *Graham v. Dyster*, 2 Stark. 23.; such notice only entitles the party to call for the originals, and on refusal to produce them, to give secondary evidence of them, by cross-examination or otherwise, as part of his own case.

What is sufficient secondary evidence.] Where a notice to produce a deed has been given, and the deed is not produced, it has been held that a counterpart, if in existence, is the next best evidence; *R. v. Castleton*, 6 T. R. 236.; if there be no counterpart, an examined copy; if no examined copy, parol evidence. *B. N. P. 254.*; acc. *Munn v. Godbold*, 3 Bing. 295. It has, however, been since ruled that there are no degrees in secondary evidence, and that where secondary evidence of a document is admissible at all, parol proof of it is sufficient, although it may appear that an attested copy, or other superior secondary proof, is in existence. *Doe v. Ross*, 7 M. & W. 102. Where such superior secondary evidence is kept back, it is a fact from which a jury may sometimes presume that it would be adverse to the party withholding it; per Lord Abinger, *C. B., Ibid.* The copy of a copy is not secondary evidence of the original. *Everingham v. Roundell*, 2 M. & Rob. 138. Parol evidence of a writing may be given as secondary evidence, though the person who wrote the instrument is alive and not called. *S. C.* It

is said that an old instrument purporting to be a copy or abstract of a conveyance, and which had for many years gone along with the possession of the land, was admitted in evidence, the original being lost, without proving it to be a true copy. *B. N. P.* 254. But see *Bac. Ab. Evid. F.* 645-6. The examined copy of the memorial of a registered conveyance is good secondary evidence, after notice to produce the original. *Molton v. Harris*, 2 *Esp.* 549.; *Doc v. Kilnes*, 2 *C. & P.* 289. After notice to the defendant to produce a letter which he admitted he had received from the plaintiff, it was ruled that an entry by the plaintiff's deceased clerk in a letter-book, purporting to be a copy of a letter from the plaintiff to the defendant, was evidence of the contents, proof being given that, according to the course of business, letters of business, written by the plaintiff, were copied by this clerk and sent off by the post. *Pritt v. Fairclough*, 3 *Camp.* 305. *Hagedorn v. Reid*, 3 *Camp.* 377. And see the cases on the admissibility of entries by deceased persons in the course of their duty, *post*, tit. *Hearsay*. But where the practice of the defendant's counting-house was, that the clerk, after copying a letter into the letter-book, returned it to the defendant to seal, and that he, or another clerk, carried all the letters to the post-office, but there was no particular place of deposit in the office for such letters, and neither of the clerks had any recollection of the particular letter, though they swore that they had uniformly carried all letters given them to carry, Lord *Tenterden* ruled that the copy in the letter-book was not evidence that the original had been sent. His Lordship added, "If the duty of the clerk had been to see the letters he copied carried to the post-office, it might have done." *Toosey v. Williams*, *M. & M.* 129. A copy of a letter taken by a copying-machine is not evidence without a notice to produce the original. *Nodds v. Murray*, 3 *Camp.* 228. See *R. v. Watson*, 2 *Stark.* 129. Where the plaintiff gave the defendant notice to produce certain letters written by the defendant to a third party and a letter-book containing copies thereof, and the defendant consented to admit the copies and produce the book, held, that the book, when produced, was good secondary evidence of the letters, and of the sending of them. *Sturge v. Buchanan*, 10 *A. & E.* 598. An entry in the register-book at the custom-house, stating that a certificate of register was granted on an affidavit of A. that he was an owner, is not admissible against A. as secondary evidence of ownership; some person who has seen the affidavit, and knows that it was made by A., must be called. *Teed v. Martin*, 4 *Camp.* 90. The filazer's book is not secondary evidence of a writ after its return, unless it be shown that search has been made in the treasury for the return, and that subsequently to the return day the writ was in the possession of the opposite party, on whom notice to produce it has been served. *Edmonstone v. Plaisted*, 4 *Esp.* 160. Where there are two parts of a written agreement executed at the same time, the one stamped, and the other unstamped, the unstamped part is admissible as secondary evidence of the contents of the stamped part. *Waller v. Horsfall*, 1 *Camp.* 501.; *Munn v. Godbold*, 3 *Bing.* 292. When a copy of an attested instrument is produced as secondary evidence, the attesting witness need not be called. *Poole v. Warren*, 8 *A. & E.* 582.

An old ledger or chartulary of an abbey, containing, amongst other things, an account of the several endowments, and found in the possession of the person who had succeeded to part of the abbey estates, was

admitted as secondary evidence of the endowment, search having been made for the original endowment. *Bullen v. Mitchell*, 2 Price, 399., & C. 4 Dow. D. P. 297. See also *Williams v. Wilcox*, 8 A. & E. 314.; where a copy of a grant in an old chartulary seems also to have been held admissible as good secondary evidence.

In an action against an executor, after notice to produce the probate, the original will, produced by the officer of the ecclesiastical court, and indorsed as the instrument on which probate was granted to defendant, with the value of the effects sworn to, is admissible evidence of the contents of the will. *Gorton v. Dyson*, 1 B. & B. 219. So where, in an avowry for a rent-charge, the avowant could not produce the will under which he claimed (it belonging to the devisee of the land), but produced the ordinary's register of the will, and proved former payments, it was held sufficient secondary evidence against the devisee. *B. N. P.* 246. Where the assignment under a commission of bankrupt was lost before it was enrolled pursuant to 6 G. 4. c. 16. s. 96., the counterpart of it was admitted as secondary evidence. *Giles v. Smith*, 1 C. M. & R. 462.

If a plaintiff has given the defendant notice to produce a document, and is obliged to give secondary evidence of it by the defendant's refusal to produce it, the defendant cannot afterwards produce it as part of his own case in order to contradict the secondary evidence. *Doe v. Hodgson*, 12 A. & E. 135.

[Parol evidence inadmissible to vary or contradict a writing.] As parol evidence is inferior in degree to written evidence, it is not admitted to vary, enlarge, or contradict the terms of an instrument in writing; for whether the writing is required by law, or spontaneously resorted to by the parties, it is evidently the intention to exclude the uncertainty of oral testimony. Thus, where it was agreed in writing that A., for certain considerations, should have the produce of Boreham meadow, it was held that he could not prove that it was at the same time agreed by parol that he should have both Milcroft and Boreham meadow. *Meres v. Ansell*, 3 Wils. 275.; and see *Hope v. Atkins*, 1 Price, 143. So parol evidence is inadmissible to shew that a note, made payable on a day certain, was to be payable on a contingency only. *Rawson v. Walker*, 1 Stark. 361.; *Foster v. Jolly*, 1 C. M. & R. 703. So where a promissory note is expressed to be made payable on demand, parol evidence of a contemporary agreement that it should not be paid until a given event happened is inadmissible. *Moseley v. Hanford*, 10 B. & C. 729.; see also *Adams v. Wordley*, 1 M. & W. 374. So where the conditions of sale described the number and kind of timber trees to be sold by lot, but not the weight of the timber, it was held, in an action for the purchase-money, that parol evidence could not be given by defendant that the auctioneer had, at the sale, warranted the timber of a certain weight. *Powell v. Edmunds*, 12 East, 6.; *Shelton v. Livius*, 2 C. & J. 411. So parol evidence is inadmissible to alter the legal construction of a written agreement. Thus where an agreement for the sale of goods was silent as to the time of delivery, in which case the law implies a contract to deliver in a reasonable time, it was held, that parol evidence of an agreement to take them away immediately was inadmissible. *Greaves v. Ashlin*, 3 Camp. 426. *Halliley v. Nicholson*, 1 Price, 404. And where a modern lease used the word "Michaelmas," the court refused to admit parol evidence that *Old Michaelmas* was meant." *Doe*

v. Lea, 11 *East*, 312. So where the written agreement was to take goods on board a ship "forthwith," parol evidence to shew that they were to be received on board in two days was not allowed. *Simpson v. Henderson*, *M. & M.* 300. An absolute sale of a reversion cannot be qualified by proof of a parol agreement to apportion the accruing rent. *Flinn v. Calow*, 1 *M. & G.* 589. If a party signs an agreement in his own name, he cannot afterwards defeat an action on it by proving that he signed only as agent for another. *Magee v. Atkinson*, 2 *M. & W.* 440.; accord. *Jones v. Lilledale*, 6 *A. & E.* 486. But in an action on a written contract between plaintiff and B., parol evidence is admissible in behalf of the plaintiff, to show that the contract was in fact, though not in form, made by B., not on his own account, but as agent of defendant. *Wilson v. Hart*, 7 *Taunt.* 295., 1 *B. Moore*, 45., *S. C.*

[*Parol evidence of matter collateral to the writing.*] Where the parties to an indenture of charterparty afterwards agreed by parol for the use of the ship at a period before the charterparty attached, the parol evidence was held admissible in an action of assumpsit on this latter agreement. *White v. Parkin*, 12 *East*, 578. A charterparty provided that the cargo should be put on board plaintiff's ship at defendant's expense. The captain employed men to do this, upon a refusal by the defendant's agent: Held, that plaintiff might recover the expenses from defendant in an action on the implied contract to repay them. *Fletcher v. Gillespie*, 3 *Bing.* 635. Where there was a parol agreement by the landlord to pay 20*l.* towards repairs in consideration that plaintiff would become tenant, and plaintiff became tenant and did the repairs, which defendant, the landlord, then promised to repay; held, that plaintiff could recover on an account stated, although the lease itself contained no such agreement. *Seago v. Deane*, 4 *Bing.* 459.

[*Parol evidence, when admissible to prove a consideration or to vary the date, or description, &c.*] A party interested in supporting the operation of a conveyance may show a sufficient consideration by parol evidence, if not inconsistent with the deed. Thus a deed operating under the Statute of Uses, and reciting no consideration, may be supported by showing that a pecuniary one in fact passed. *Mildmay's Case*, 1 *Co.* 176. So a deed, which recites only a pecuniary consideration, may be shown to have been also founded on the consideration of marriage. *Villers v. Beaumont*, *Ibid.*; and *Tull v. Parlett*, *M. & M.* 472. So in a settlement case, where the deed of conveyance stated the consideration of the purchase to be twenty-eight pounds, parol evidence was admitted to show that the consideration was in fact thirty pounds; *R. v. Scammonden*, 3 *T. R.* 474.; and that money, stated in a deed of apprenticeship to have been paid by J. M., was in fact parish-money. *R. v. Llangunnor*, 2 *B. & Ad.* 616. In the two last cases, indeed, the parol proof was admissible, not only on the ground of its consistency with the writing, but also because the recital in the deed was *res inter alios* which the contending parishes were not estopped from correcting even by testimony inconsistent with the writing. Thus a parish may show a settlement by renting a tenement in parish B., though the lease describes it as in parish A. *R. v. Wickham*, 2 *A. & E.* 517.

A deed takes effect from the delivery, and not from the date; there-

fore parol evidence was allowed to show that a lease dated on Ladyday, 1783, and purporting to commence on *Ladyday last past*, was in fact executed after the date, and that the term therefore commenced on Ladyday, 1783, and not 1782. *Steele v. Mart*, 4 B. & C. 272.

Parol proof was permitted to be given that plaintiff had made certain admissions on his examination before commissioners of bankrupt, although the written examination produced by the defendant's witness contained no such admissions. *Rowland v. Ashby*, R. & M. 231. So, although the written examination, taken by a magistrate on a criminal charge, is the best evidence of such examination, yet any additional statements made by the examined, and not reduced to writing, may be proved by parol. *Venafra v. Johnson*, 1 M. & Rob. 316. See further *Roscoe's Dig. Crim. Evid.* 45. Mere words of description in a deed, not operating by way of estoppel, may be contradicted by parol; thus the lessee of land, described as "meadow," may prove it to be arable in an action by the lessor for ploughing it up; *Skipwith v. Green*, 1 Stra. 610.; or he may show that land described as containing 500 acres does in fact contain so many. S. C. as reported *Bac. Ab. Pleas*, I. 11.

Parol evidence admissible to prove fraud, illegality, or error in written instruments.] Where fraud is imputed, any consideration or fact, however contrary to the averment of a deed, may be proved to show the fraudulent nature of the transaction; *B. N. P.* 173.; *Paxton v. Popham*, 9 East, 421.; for fraud is a matter extrinsic and collateral, which vitiates all transactions, even the most solemn. Thus, in order to set aside a will, parol evidence may be given of what passed at the signing, and what the testator said, to show that his signature was obtained by fraud. *Doe v. Allen*, 8 T. R. 147. And, in general, every matter which in law avoids an instrument, whether it be fraud, illegality, want of stamp, &c., may be proved by parol, however contradictory to its tenor, provided the pleadings be adapted to such evidence. So, where a conveyance of land was expressed to be for the consideration of thirty pounds, yet, in order to avoid the settlement of a pauper, it may be shown that the purchase-money did not, in fact, amount to thirty pounds. *R. v. Mattingley*, 2 T. R. 12. See *Doe v. Ford*, 3 A. & E. 649. Evidence is sometimes admissible to show a mistake in writing; thus, a contract, usurious on the face of it, may be explained by showing it was made so by a clerical error. *Anon.* 1 Freem. 253.; *Booth v. Cooke*, 1 Freem. 264. So a house, misdescribed in a lease as No. 38., may be shown to be in truth No. 35. *Hutchins v. Scott*, 2 M. & W. 816., *per Curiam*. But where a verdict and judgment were given in evidence to prove a public way, the court would not admit proof that the verdict was entered erroneously by the mistake of the officer. *Reed v. Jackson*, 1 East, 355.

Parol evidence, when admissible, to explain a mercantile contract.] Where the parties have contracted in writing, in many instances parol evidence is admitted to prove an usage affecting the contract, on the ground that, where such usage exists, the parties must be taken to have made their contract subject to its operation. Thus, in the construction of mercantile contracts, parol evidence is always admitted to show the sense in which, according to the custom of merchants, such contracts are to

be understood. As where a ship was warranted to depart with convoy, evidence of the usage amongst merchants was admitted to show that this meant convoy from the usual place of rendezvous; *Lethulier's Case*, 2 Salk. 443. ; so to explain the meaning of "days" in a bill of lading; *Cochran v. Retberg*, 3 Esp. 121. ; to show that the Gulf of Finland is considered by mariners to be within the Baltic; *Uhde v. Walters*, 3 Camp. 16. ; or the Mauritius to be an East Indian island. *Robertson v. Money*, R. & M. 75. So evidence was admitted to explain the term "privilege" in a contract between shipowner and captain; *Birch v. Depeyster*, 4 Camp. 385. ; and to show the received meaning of "mess pork of S. and Co." *Powell v. Horton*, 2 New Ca. 668. Where the captain of a ship agreed to convey a boat of certain dimensions for the plaintiff, evidence was admitted on behalf of the captain that the practice was to remove the deck of such boats when put on board. *Haynes v. Holliday*, 7 Bing. 587. Apparent variances in bought and sold notes may be reconciled by the evidence of brokers. *Bold v. Raymer*, 1 M. & W. 343. Where it was represented to an insurer that the ship would sail from St. Domingo in October, he was permitted to show in his defence, that this was understood among merchants to mean between the 25th and the end of October, whereas the ship sailed on the 11th. *Chaurand v. Angerstein*, Peake 43. So a clerk in the office in which an account was kept was permitted to explain the meaning of a particular item. *Hood v. Reeves*, 3 C. & P. 532. Parol evidence may be given to explain the meaning of the word *level* in a mining lease. *Clayton v. Gregson*, 5 A. & E. 302. So, where instructions were given by a principal residing out of England to his factor to sell corn, a custom in the London corn market to sell in the factor's own name is admissible to explain the instructions. *Johnston v. Osborne*, 11 A. & E. 549.

But proof of the usage of trade is not admissible to contradict the plain words of an instrument ; as where a policy of insurance was "on the ship till moored at anchor twenty-four hours, and on the goods till discharged and safely landed," evidence of a usage, that the risk on the goods as well as the ship expired in twenty-four hours, was held inadmissible to qualify the unequivocal words of the policy. *Parkinson v. Collier*, *Park Ins.* 416. 6th ed. So in an action on a warranty of "prime singed bacon," parol evidence was rejected of a practice in the bacon trade to receive bacon in some degree tainted as "prime singed bacon." *Yates v. Pym*, 6 Taunt. 446., 2 Marsh. 141. S. C. So parol evidence is inadmissible to explain the meaning of the words "more or less" in a mercantile contract. *Semble*, *Cross v. Eglin*, 2 B. & Ad. 106. It has been doubted whether the practice of admitting parol evidence in these cases has not been carried to an inconvenient length. See *Anderson v. Pitcher*, 2 B. & P. 168. "How far a mercantile contract reduced to writing and signed by the parties, which is silent on a particular point, may have that silence supplied by evidence of the general course and usage of the trade to which it relates, is a question which it would be difficult to answer with exactness and precision." *Per Tindal C. J.*, 2 New Ca. 369, 370. in *Whittaker v. Mason*. In a contract for the sale of tallow by defendant in the name of a broker who was his known representative, the defendant was not allowed to show a custom of trade upon such a contract to look to the broker for its completion; *Trueman v. Loder*, 11 A. & E. 589. ; and *per Curiam*, *Ibid.*; "The cases go no farther than to permit the explanation of

words used in a sense different from their ordinary meaning, or the addition of known terms not inconsistent with the written contract."

Parol evidence, when admissible to control or explain agricultural contracts.] A custom affecting the contract may be proved by parol in other, as well as in mercantile, contracts, as in the case of customs affecting agricultural contracts. Thus, it may be proved that a heriot is due by custom on the death of a tenant, though not expressed in the lease. *White v. Sayer*, *Palm*. 211. Or, that a lessee by deed is entitled by custom to an away-going crop, though it be not mentioned in the deed. *Wiggleworth v. Dalison*, 1 *Dougl.* 201. So in the case of a lease not under seal. *Senior v. Armytage*, *Holt*, 197. But where a covenant excludes the customary right by an express provision on the subject matter of the custom, evidence of such right is inadmissible. *Webb v. Plummer*, 2 *B. & A.* 746. *Roberts v. Barker*, 1 *C. & M.* 808. But the custom may still prevail, though the terms of the holding are inconsistent with it, where it only relates to the period of quitting. *Holding v. Pigott*, 7 *Bing.* 475. And even where there is an express stipulation respecting the quitting, yet it may not always be sufficient to exclude the custom. Thus, where the custom was for the tenant to be paid for the last year's ploughing and sowing, and to leave the manure if the landlord would buy it; and the lease provided that the tenant should spend more manure than the custom required, leaving the rest to be paid for by the landlord at the end of the term; held, that the tenant was still entitled to be paid for the last year's ploughing and sowing under the custom. *Hutton v. Warren*, 1 *M. & W.* 466. On the lease of a rabbit warren, parol evidence was admitted to show that by the custom of the county, the word "thousand" means twelve hundred when applied to rabbits. *Smith v. Wilson*, 3 *B. & Ad.* 728. A contract for the sale of cyder may be explained, by local usage, to mean apple juice before it has been made into cyder in its usual form. *Studdy v. Sanders*, 5 *B. & C.* 628.

Parol evidence admissible to explain ancient charters, grants, &c.] Long user may serve to explain an ambiguous act of parliament. *Stewart v. Lawton*, 1 *Bing.* 377. In the construction of ancient charters, expressed in obscure or general terms, parol evidence has always been admitted to prove the continual and immemorial usage under the instrument. 2 *Inst.* 282. *R. v. Varlo*, *Cowp.* 248. *Chad v. Tilsed*, 2 *B. & B.* 406. Thus, in a crown grant of "tithes," contemporaneous leases, proceedings in causes, and parol testimony, may be resorted to in order to show the species of tithes intended to be conveyed. *Governors of Lucton School v. Scarlett*, 2 *Y. & J.* 330. Where a private deed of 1656 gave the nomination of a curate to "inhabitants," it was held that the word was properly explained by past usage to mean all housekeepers. *Attorney-General v. Parker*, 3 *Atk.* 576. So the same word, in a charter of Edward VI., was explained by usage to mean inhabitants paying church and poor rates. *R. v. Davie*, 6 *A. & E.* 374. There seems to be no distinction in this respect between charters and private deeds. *Withnell v. Gartham*, 6 *T. R.* 398. The words "three acres of meadow," in a surrender and admittance, may be confined by long user to the *prima tonsura*. *Stammers v. Dixon*, 7 *East*, 200. But evidence of usage, however long, will not be admitted to overturn the clear words

of a charter. *R. v. Varlo*, *Cowp.* 248. In the case of modern deeds evidence of the acts of the parties is not admissible, in the construction of the instrument, to show their understanding of it. *Clifton v. Walmsley*, 5 T. R. 564. *Iggulden v. May*, 9 Ves. 333. 2 N. R. 449.

Parol evidence admissible to discharge written agreements.] A deed cannot be revoked or discharged by parol, or even, by writing not under seal, an executory agreement in writing, not under seal, may, before breach, be discharged by a subsequent parol agreement; *Lord Milton v. Edgworth*, 6 Brown P. C. 587.; after breach, it cannot be discharged except by release under seal, or accord and satisfaction; *B. N. P.* 152.; *Willoughby v. Backhouse*, 2 B. & C. 824.; or by proof of a valid agreement substituting a new cause of action in place of the old. *Case v. Barber*, T. Raym. 450. In these cases, wherever the subsequent parol agreement has had the effect, in point of law, of varying or discharging the original one, it is admissible in evidence. Thus, in an action for not accepting goods, where it appeared that the agreement in writing was to deliver at a fixed time, the plaintiff may show a subsequent extension of the time by verbal agreement. *Cuff v. Penn*, 1 M. & S. 21. A distinction is to be observed on this head between contracts in writing under the Statute of Frauds, and contracts at common law. In the former case a parol contract will not be admitted to show a subsequent variation in the written contract; as where several lots of land were bought together, it cannot be shown that the purchaser has by parol waived the contract as to one lot to which the vendor could not make title; *Goss v. Lord Nugent*, 5 B. & Ad. 58.; or, that the parties varied the day of completion. *Stowell v. Robinson*, 3 New Ca. 928. But the court said it would have been otherwise if the contract had not been subject to the control of an act of parliament; that where a contract has been reduced into writing, it is competent to the parties, at any time before the breach of it, by a new contract not in writing either altogether to waive, dissolve, or alter the former agreement, or to qualify the terms of it, and thus to make a new contract, which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon it. *Goss v. Lord Nugent*, 5 B. & Ad. 65.

Parol evidence admissible to explain latent ambiguity.] Where an ambiguity, not apparent on the face of a written instrument, is raised by the introduction of parol evidence, the same description of evidence is admitted to explain it; for example, where a testator devises his estate of Blackacre, and has two estates called Blackacre, evidence may be admitted to show which of the Blackacres is meant; or if one devises to his son John Thomas, and he has two sons of the name of John Thomas, evidence may be admitted to show which of them the testator intended. *Per Gibbs, C. J.*, *Doe v. Chichester*, 4 Dow. 93. *Doe v. Morgan*, 1 C. & M. 235. And where the description of the devisee, or thing devised, is true in part, but not true in every particular, parol evidence is admissible to show the person or thing intended, provided there is enough on the face of the will to justify the application of the evidence; *per Cur.* in *Müller v. Travers*, 8 Bing. 248-9. Thus, an error in a christian or surname may be proved. *S. C.*, and see *Careless v. Careless*, 1 Meriv. 384. Where the grantor had no lands agree-

ing with the description in the deed, the lands intended to be conveyed may be shown by the contract of sale, or by letters written between the parties and their agents. *Beaumont v. Field*, 1 B. & A. 247. But where a devise was to John H., the eldest son of John H., and it appeared that John H., the father, had an eldest son, named Simon, and a son by a second marriage named John, held that declarations of the testator were not admissible to show which was meant. *Doe v. Hiscocks*, 5 M. & W. 363. Where a devise was to S. H., second son of T. H., but in fact S. H. was the third son; evidence of the state of the testator's family, and of other circumstances, was admitted to show whether he had mistaken the name or the description. *Doe v. Huthwaite*, 3 B. & A. 632. But evidence of the testator's declared intention would not, it seems, have been admissible. See the judgment in *Doe v. Hiscocks*, 5 M. & W. 369. Where the devise was to John A., grandson of T. A., with a charge in favour of "each of the brothers and sisters" of the said John A., and it appeared that there were two grandsons of T. A., both named John A., held that parol declarations of the testator were admissible to show which was meant, although it also appeared that only one of the grandsons had several brothers and sisters. *Doe v. Allen*, 12 A. & E. 451. In the case of a devise to testator's niece, remainder to her three daughters M., E., and A., the niece at the time of making the will had two legitimate daughters, M. and A. and one illegitimate, E.; held that the claim of the latter might be rebutted by shewing that the niece formerly had a legitimate daughter, E., and that the testator knew nothing of the death of the legitimate, or the birth of the illegitimate E. *Doe v. Beynon*, 12 A. & E. 431. Where a fine was levied of twelve messuages in Chelsea, and it appeared that the cognizor had more than twelve messuages in Chelsea, parol evidence was admitted to show which messuages in particular the cognizor intended to pass. *Doe v. Wulford*, R. & M. 88. S. C., 8 D. & R. 549. Where a devise was of "Trogues Farm, in the occupation of A.," it may be shewn that A. was not a tenant. *Goodtitle v. Southern*, 1 M. & S. 299.

It may be laid down as a general rule that all facts relating to the subject and object of the devise, such as, that it was not in the possession of the testator, the mode of acquiring it, the local situation, and the distribution of the property, are admissible to aid in ascertaining what is meant by the words used in a will. *Parke, J.*, in *Doe v. Martin*, 4 B. & Ad. 785.

Where a subject matter exists which satisfies the terms of the will, and to which they are perfectly applicable, there is no latent ambiguity, and no evidence can be admitted for the purpose of applying the terms to a different object. 3 *Stark. Ev.* 1026., 1st ed. Thus, where a testator devised his "estate at Ashton," it was held, that parol evidence was inadmissible to show that he was accustomed to call all his maternal estate "his Ashton estate," there being an estate in the parish of Ashton which was sufficient to satisfy the devise. *Doe v. Oxenden*, 3 Taunt. 147. S. C. in *Error*, 4 Dow. 65. See also *Carruthers v. Shedden*, 6 Taunt. 14. So where words have acquired a precise and technical meaning, no other meaning can be applied to them. *Lord Kenyon*, *Lane v. Earl of Stanhope*, 6 T. R. 352. In the case of a legacy to the testator's "heir," it cannot be shown that a testator was in the habit of calling a person his heir who was not so. *Mounsey v. Blamire*, 4 Russ. 384. If a will names the devisee, and it be shown by parol that

there are several to whom the name applies; yet this is not enough to let in parol evidence of intention, where it can be collected from the will itself who was intended. *Doe v. Westlake*, 4 B. & A. 57.

Where the ambiguity is not latent, or raised by extrinsic evidence, but patent or apparent on the face of the instrument, parol evidence is not admissible to explain such ambiguity. Thus, where a blank is left for the devisee's name in a will, parol evidence cannot be admitted to show whose name was intended to be inserted. *Baylis v. Att. Gen.*, 2 Atk. 239.. But where a blank was left for the christian name only, parol evidence was admitted to prove the individual intended. *Price v. Page*, 4 Ves. 680. But see 2 M. & W. 139. !So in case of a devise "to Mrs. C." the Chancellor referred it to the Master to receive evidence to show the person intended. *Abbott v. Massie*, 3 Ves. 148. Where a will mentioned George, the son of George Gord, and also George the son of John Gord, a bequest to "George the son of Gord" was explained by proof of the declarations of the testator to mean George the son of George Gord; *Doe v. Needs*, 2 M. & W. 129. : in reply to the argument that this was a *patent* ambiguity, it was said that it could only appear ambiguous by showing *abunde* the non-existence of a George the son of Gord, different from the other two Georges; and that the mention of another George in the same will had no other effect than extrinsic proof of the same fact would have had.

Where a blank is left in a written agreement which need not have been reduced into writing, and would have been equally binding if written or unwritten (as if the agreement were to deliver goods to the amount of less than ten pounds, and a blank were left for the quantity of goods to be delivered), in such a case it is presumed, in an action for the non-performance of the contract, parol evidence might be admitted to show the quantity for which the parties agreed. 1 *Phill. Ev.* 521. It might indeed be contended that an instrument so imperfect on the face of it is no contract at all so as to exclude parol evidence. See *ante*, p. 3. As to the effect of omissions in a contract within the Statute of Frauds, see *post*, "*Assumpsit for not accepting goods.*" Where, in the entry of an appointment to a curacy in the bishop's register, a blank was left for the patron's name, it was held that this might be supplied by parol evidence. *Bishop of Meath v. Lord Belfield*, 1 *Wils.* 215. A demise offered in evidence was a printed blank form filled up and altered for use; held that the court might look at the parts struck out in order to ascertain the intent of the parties in what remained. *Strickland v. Maxwell*, 2 C. & M. 539.

[*Parol evidence admissible on questions of parcel or no parcel.*] Where the question is "parcel or no parcel," parol evidence is admissible to explain a writing. Thus where a testator devised "all his farm called Trogues farm," it was held that it might be shown of what parcels the farm consisted. *Goodtitle v. Southern*, 1 M. & S. 299. Where a lease professed to demise premises and a yard, extrinsic evidence was admitted to rebut the presumption that a cellar under the yard was also intended to pass. *Doe v. Burt*, 1 T. R. 701. So in case of a written agreement to convey "all those brick-works in the possession of A. B.," parol evidence of what passed on making the agreement was admitted to show what brick-works were intended to pass. *Paddock v. Fradley*, 1 C. & J. 90. Conditions of sale, seen by a purchaser at the

time of sale, are evidence against him to shew what was then reputed parcel of the premises conveyed to him by deed. *Murley v. M'Dermott*, 8 A. & E. 138.

PRESUMPTIVE EVIDENCE.

Presumptive evidence is usually so called in contradistinction to direct or positive proof; though all moral proof is, in strictness, founded on probability and presumption. Thus a fact attested by the direct evidence of an ocular witness can only be admitted to be true on the double presumption that the witness neither deceives, nor is deceived. Presumptive evidence, though liable to be rebutted by evidence to the contrary, is not, in its nature, secondary to positive evidence. Thus, although the payment of rent may be proved by the positive evidence of a person who saw it paid, yet it may also be proved by the production of a receipt for later arrears, which affords a presumption that the earlier arrears are satisfied, without laying any ground for the introduction of such evidence by showing that positive evidence cannot be procured.

Presumptions have been divided, after the example of the Roman law, into three classes: 1. Presumptions *juris et de jure*. 2. Presumptions of law (*juris*). 3. Presumptions of fact (*hominis*).

(1.) The first kind are purely artificial and admit of no contradiction by contrary evidence; of this kind is the presumed revocation of a will by a subsequent alteration of the property. *Goodtitle v. Otway*, 2 H. Black. 522.; or the old rule of law by which a son born of a mother whose husband lived within the realm was conclusively held to be legitimate. *Co. Litt.* 244. a. So some damage is conclusively presumed to result from an unlawful act done by the defendant and actionable *per se*.

(2.) The second class of presumptions includes those cases in which a jury will be directed by the court to presume a fact, of which no evidence has been given. Thus a bill of exchange is always presumed to be given for a good consideration. *Phillistirk v. Pluckwell*, 2 M. & S. 395. So the law always presumes innocence; therefore, where a woman married a second husband after the first had gone abroad and not been heard of for a year, the party who wished to prove bigamy was called upon to show the first husband was then alive. *R. v. Twyning*, 2 B. & A. 386.; but see *R. v. Harborne*, 2 A. & E. 540. So the law presumes in favour of possession; and, in the case of land, presumes the highest estate in it, viz. a seisin in fee. See *post*, p. 22. So the continuance of things in *status quo* will be generally presumed; as where the plaintiff being slandered in his official character proves his appointment to the office before the libel, his continuance in office at the time of the libel need not be proved, though averred. *R. v. Budd*, 5 Esp. 230. So the law presumes that a party intended that which is the immediate or probable consequence of his act. *R. v. Dixon*, 3 M. & S. 11. 15. These and similar presumptions admit of proof to the contrary; but, in the absence of such proof, the jury are as much bound to find agreeably to the legal presumption, as they are to find according to the law as explained by the judge.

(3.) The third class of presumptions is exclusively within the province of the jury, and they occur whenever direct proof of a fact is

there are several to whom the name applies; yet, to let in parol evidence of intention, where it can will itself who was intended. *Doc v. Westlake*,

Where the ambiguity is not latent, or raised but patent or apparent on the face of the instrument, it is not admissible to explain such ambiguity. For the devisee's name in a will, parol evidence will show whose name was intended to be. *2 Atk. 239.* But where a blank was left, parol evidence was admitted to prove. *Page, 4 Ves. 680.* But see *2 M.*

"to Mrs. C." the Chancellor refused evidence to show the person intended.

Where a will mentioned George, the son of John Gord, a bequest

explained by proof of the death of the son of George Gord;

the argument that this was a custom may be presumed from an unambiguous

only appear ambiguous. *R. v. Joliffe, 2 B. & C. 54.* *Jenkins*

George the son of George Gord. *577.* The flowing of the tide is presumptive that the mention of a navigable river. *Miles v. Rose, 5 Taunt. 705.* But

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Presumption of payment. If a landlord gives a receipt for the rent

last due, it is to be presumed that all former rent has been paid. *Gibb*

Ev. 157. Where a bill of exchange, negotiated after acceptance, is

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is, that the acceptor has paid it; *Gibson v. Featherstonhaugh,*

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affords prima facie evidence of payment to him. Egg v. Barnett, 3 Esp.
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that the mere proof of a check being made payable to A., and of A.
having received payment of it, is not evidence of the payment of money
by the maker to A., for it might have been given to a third person, and
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Although the limitation of actions on bonds is now provided for by
stat. 3 & 4 W. 4. c. 42. (see post "Debt on Bond"), yet a reference to
the former law will still be occasionally necessary. Payment of a bond
is presumed after twenty years without demand made ; *Oswald v. Legh*,
1 T. R. 270. ; and even after the lapse of a less time, if other circum-
stances concur to fortify the presumption, as a settlement of accounts
in the mean time. *Ibid. Colsell v. Budd*, 1 Camp. 27. The presump-
tion may be rebutted by circumstances, as by the defendant's admis-
sion of the debt, or by proof of payment of interest within twenty
years. So by proof that the defendant has resided abroad during
the whole of the time ; *Newman v. Newman*, 1 Stark. 101. ; *Elliott v.*
Elliott, 1 M. & Rob. 44. But proof of the defendant's poverty is not
sufficient to rebut the presumption. *Willauve v. Gorges*, 1 Camp. 217.
See, however, *Fladong v. Winter*, 19 Ves. 196., and *Hull v. Horner*,
Comp. 102., and the note to 3 M. & R. 118., where the origin of the
doctrine of twenty years' presumption is discussed. Indorsements on
the bond, made by the deceased obligee, acknowledging the receipt of
interest within twenty years, have been admitted to rebut the presump-
tion, provided there be evidence that such indorsements existed before
the presumption of payment arose. *Searle v. Lord Barrington*, 2 Stra.
836. ; *Rose v. Bryant*, 2 Camp. 322. ; *Gleadow v. Atkin*, 1 C. & M. 421.
It was held otherwise where the indorsement was made after the
lapse of twenty years. *Turner v. Crisp*, 2 Stra. 827. Since Lord Ten-
terden's Act, 9 Geo. 4. c. 14., indorsements of this kind are no longer
sufficient to prevent the operation of the Statute of Limitations, but they
are still admissible to rebut the presumption of payment. An indorse-
ment, made within twenty years, of the payment of interest within

offered to the jury as evidence of another fact which is the usual consequence or accompaniment of the former.

A few of the most useful and usual cases only will be selected as examples.

In case of an ancient recovery, accompanied by possession, it will be presumed, that the tenant to the *præcipe* was seised of the freehold, and such seisin need not be proved. *Gilb. Ev.* 27. So a deed, thirty years old, or upwards, is presumed to have been duly executed, provided some account be given of the deed, where found, &c. *B. N. P.* 255. An endowment of a vicarage may be presumed, from the long and continued possession of tithes and other profits. *Crimes v. Smith*, 12 *Rep.* 4.; and see *Wolley v. Brownhill*, *M'Clel.* 332. A licence may be presumed; thus, where an inclosure having been made from a waste twelve or fourteen years, and seen by the steward of the lord from time to time, without objection made, it was left to the jury to say whether or not the inclosure was made by the lord's licence. *Doe v. Wilson*, 11 *East*, 56. *Bridges v. Blanchard*, 1 *A. & E.* 536. The existence of an immemorial custom may be presumed from an uncontradicted usage of twenty years. *R. v. Joliffe*, 2 *B. & C.* 54. *Jenkins v. Harvey*, 1 *C. M. & R.* 877. The flowing of the tide is presumptive evidence of a public navigable river. *Miles v. Rose*, 5 *Taunt.* 705. But the strength of this *prima facie* evidence depends upon the situation and nature of the channel; *R. v. Montague*, 4 *B. & C.* 602.; and long obstruction of the right of navigation may be presumptive evidence of its legal extinction. *S. C. Id.*

A letter is presumed to have been written on the day on which it is dated, as against the writer. *Hunt v. Massey*, 5 *B. & Ad.* 902. An entry in a merchant's book, purporting to be a copy of a letter addressed by him to his partner abroad, is evidence, as against the writer, that it was also sent. *Sturge v. Buchanan*, 10 *A. & E.* 598. So indorsements on a promissory note, admitting the receipt of interest, are presumed to have been made at the time they bear date. *Smith v. Battens*, 1 *M. & Rob.* 341. And a bill is presumed to be made on the day of its date; *Owen v. Waters*, 2 *M. & W.* 91.; except when used to prove a petitioning creditor's debt. *Anderson v. Weston*, 6 *New Ca.* 296. 301.

In many cases though the fact of actual knowledge cannot be proved, it will be presumed. Thus, where the rules of a club are contained in a book kept by the master of the club, every member of the club must be presumed to be acquainted with them. *Raggett v. Musgrave*, 2 *C. & P.* 556. *Alderson v. Clay*, 1 *Stark.* 405. *Wiltzie v. Adamson*, 1 *Phill. Ev.* 252. 6th ed.

Presumption of payment.] If a landlord gives a receipt for the rent last due, it is to be presumed that all former rent has been paid. *Gilb. Ev.* 157. Where a bill of exchange, negotiated after acceptance, is produced from the hands of the acceptor after it is due, the presumption is, that the acceptor has paid it; *Gibbon v. Featherstonhaugh*, 1 *Stark.* 225.; but not without proof of circulation after acceptance. *Pfiel v. Vanbatenberg*, 2 *Camp.* 439. Proof that the plaintiff and other workmen employed by the defendant came regularly to receive their wages from the defendant whose practice was to pay every week, and that the plaintiff had not been heard to complain of non-payment, is presumptive evidence of payment. *Lucas v. Novosilski*,

1 *Esp.* 296. *Sellen v. Norman*, 4 C. & P. 80. So where the demand was for the proceeds of milk sold daily to customers by the defendant as agent to the plaintiff, and it appeared that the course of dealing was for the defendant to pay the plaintiff every day the money which she had received without any written voucher passing, it was ruled that it was to be presumed, that the defendant had in fact accounted, and that the *onus* of proving the contrary lay on the plaintiff. *Evans v. Birch*, 3 Camp. 10. So where goods have been consigned to a factor to sell on commission, it may be presumed, after a reasonable time (e. g. 14 years) has elapsed, that he has accounted. *Topham v. Braddick*, 1 Taunt. 572. A debt, whether by simple contract or specialty, may be presumed to be satisfied from mere lapse of time. Thus a loan thirteen years ago may be presumed to be repaid where no evidence to the contrary is offered; *Cooper v. Turner*, 2 Stark. 497.; even where the Statute of Limitations is not insisted on. A similar presumption arises in the case of a promissory note. *Duffield v. Creed*, 5 Esp. 52. This however has been since doubted; *Du Bel-lois v. Waterford*, 1 Dow. & Ry. 16. The mere production of a check drawn by the defendant on his banker, and payable to the plaintiff, with proof that he indorsed his name upon it, and that it has been paid, affords *prima facie* evidence of payment to him. *Egg v. Barnett*, 3 Esp. 196. *Bonwell v. Smith*, 6 C. & P. 60. But it was ruled by *Dallas, C. J.*, that the mere proof of a check being made payable to A., and of A. having received payment of it, is not evidence of the payment of money by the maker to A., for it might have been given to a third person, and by him to A. *Lloyd v. Sandilands*, Gow. 16.

Although the limitation of actions on bonds is now provided for by stat. 3 & 4 W. 4. c. 42. (see *post* "Debt on Bond"), yet a reference to the former law will still be occasionally necessary. Payment of a bond is presumed after twenty years without demand made; *Orswald v. Legh*, 1 T. R. 270.; and even after the lapse of a less time, if other circumstances concur to fortify the presumption, as a settlement of accounts in the mean time. *Ibid.* *Colewell v. Budd*, 1 Camp. 27. The presumption may be rebutted by circumstances, as by the defendant's admission of the debt, or by proof of payment of interest within twenty years. So by proof that the defendant has resided abroad during the whole of the time; *Newman v. Newman*, 1 Stark. 101.; *Elliott v. Elliott*, 1 M. & Rob. 44. But proof of the defendant's poverty is not sufficient to rebut the presumption. *Willaume v. Gorges*, 1 Camp. 217. See, however, *Fladong v. Winter*, 19 Ves. 196., and *Hull v. Horner*, Coup. 102., and the note to 3 M. & R. 118., where the origin of the doctrine of twenty years' presumption is discussed. Indorsements on the bond, made by the deceased obligee, acknowledging the receipt of interest within twenty years, have been admitted to rebut the presumption, provided there be evidence that such indorsements existed before the presumption of payment arose. *Searle v. Lord Barrington*, 2 Stra. 826.; *Rose v. Bryant*, 2 Camp. 322.; *Gleadow v. Atkin*, 1 C. & M. 421. It was held otherwise where the indorsement was made after the lapse of twenty years. *Turner v. Crisp*, 2 Stra. 827. Since Lord Tenterden's Act, 9 Geo. 4. c. 14., indorsements of this kind are no longer sufficient to prevent the operation of the Statute of Limitations, but they are still admissible to rebut the presumption of payment. An indorsement, made within twenty years, of the payment of interest within

twenty years, is sufficient to rebut the presumption, though the interest accrued beyond twenty years. *Sanders v. Meredith*, 3 M. & R. 116.

Presumption of property.] Proof of the possession of land, or of the receipt of rent from the person in possession, is *prima facie* evidence of seisin in fee. See *post* in "*Ejectment*." The owner of the fee-simple is presumed to have a right to the minerals, but that presumption may be rebutted by absence of enjoyment, and user by persons not the owners of the soil. *Rowe v. Grenfel*, R. & M. 396. See *Rowe v. Brenton*, 6 B. & C. 737. Payment of a small unvaried rent for a long series of years [e. g. 38] to the lord of a manor, raises the presumption that the rent is a quit rent, and not that the lord is entitled to the land. *Doe v. Johnson*, Gow. 173. In ejectment for a mine, a former recovery in trover for a parcel of lead dug out of it affords no evidence of the plaintiff's possession of the mine. *B. N. P.* 102. Possession of personal chattels is *prima facie* evidence of property; see *post* in "*Assumpsit on Policy of Insurance. Proof of Interest*." And see more as to the Presumption of Ownership, *post* "*Trespass*."

Presumption of grants, &c.] Before the late statute 2 & 3 W. 4. c. 71., for shortening the time of prescription, evidence of the adverse enjoyment of an easement (as of lights or a way) for twenty years or upwards, unexplained, was held to afford a presumption of a grant or other lawful title to enjoy it; *Lewis v. Price*, 2 Saund. 175. (n); *Campbell v. Wilson*, 3 East, 294. Where the defendant pleaded a right of way granted by a lost deed, and the plaintiff traversed the grant, and the judge directed the jury that if they thought the defendant had exercised the right of way uninterruptedly for more than twenty years by virtue of a deed, they would find for the defendant; but, if they thought there had been no way granted by deed, they would find for the plaintiff; it was held that this direction was right. *Livett v. Wilson*, 3 Bing. 115. *post*, "*Case for Disturbance of Way*." The uninterrupted possession of a pew for thirty-six years affords a presumption of title. *Rogers v. Brooks*, [cited 1 T. R. 431. (n). Twenty years' exclusive possession of a stream of water in any particular manner was held to afford a presumption of right in the party enjoying it, derived from a grant or act of parliament. *Bealey v. Shaw*, 6 East, 215. See *Mason v. Hill*, 5 B. & Ad. 1. *Magor v. Chadwick*, 11 A. & E. 571. Where it was proved, that the owners of a fishery and their lessees had for above twenty years publicly landed their nets on another's ground, and had occasionally repaired the landing-places, it was held that it was properly left to the jury to presume a grant of the right of landing nets to the owners of the fishery. *Gray v. Bond*, 2 B. & B. 667. In order, however, to establish the presumption of a grant of a way, it must appear that the possession was with the acquiescence of him who was seised of an estate of inheritance; for a tenant for life or years has no power to grant such right; *Bright v. Walker*, 1 C. M. & R. 219.; *Daniel v. North*, 11 East, 372.; *Barker v. Richardson*, 4 B. & A. 679.; but, if the easement existed previously to the commencement of the tenancy, the fact of the premises having been for a long time in the possession of a tenant will not defeat the presumption of a grant. *Cross v. Lewis*, 2 B. & C. 686. *post*, p. 24. The above act for shortening prescription enacts, sec. 6., that in the cases provided for by that act (that is, in

cases of easements and profits a prender), no presumption shall be made in support of a claim on proof of enjoyment for a less period than the number of years specified in the act.

It has been doubted whether the enjoyment of a sawpit and timber-yard for twenty years will establish a right to prevent a neighbour from intercepting the light and air. *Roberts v. Macord*, 1 M. & Rob. 230. See *Gale and Whalley on Easements*, 195—7.

Charters and grants from the Crown may be presumed from great length of possession (as, for instance, 100 years), not merely in suits between private parties, but even against the Crown itself, if the Crown were capable of making the grant. *Mayor of Kingston v. Horner*, *Cowp.* 102.; *Jenkins v. Harvey*, 1 C. M. & R. 877. Even where there is no person competent to make an indefeasible grant, an act of parliament may be presumed in favour of long user. *Lopez v. Andrew*, 3 M. & R. 329. (n). But it has been said that "no judge would venture to direct a jury that they could affirm the passing of an act of parliament within the last 250 years on an important subject of general interest, of which no vestige can be found on the parliament roll, or other records, or in the history of the country:" and the court accordingly refused to presume any act sanctioning a mode of nominating by the Crown to a deanery which was shown to have begun in the sixteenth century, and to have continued without interruption for the last 250 years. *R. v. The Chapter of St. Peter's Exeter*, 12 A. & E. 512. See cases of presumption arising from long possession mentioned, *arguendo*, in *Tenny v. Jones*, 10 Bing. 78.; and *post*, tit. "Ejectment." Where the origin of the possession is accounted for without the aid of grant or conveyance, and is consistent with the fact of there having been no conveyance, it is a question for the jury whether, in fact, any conveyance has actually been executed. *Doe v. Reed*, 5 B. & A. 232. And where there is no evidence of the right except mere user without any trace of the commencement of it, then there is no ground for presuming any specific grant; but it is evidence of a title by prescription. *Blewett v. Tregonning*, 3 A. & E. 554.

The mere possession of a lease by the lessor, with the seals cut off, affords no presumption of a surrender by a written instrument according to the Statute of Frauds. *Doe v. Thomas*, 9 B. & C. 288.

Presumption of dedication of way to the public.] If the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing over it by positive prohibition, he shall be presumed to have dedicated it to the public; *per Lord Ellenborough*, *R. v. Lloyd*, 1 Camp. 262.; but proof of a bar having been placed across the street, soon after the houses which form the street were finished, will rebut the presumption of dedication, though the bar was soon afterwards knocked down, since which period the way has been used as a thoroughfare. *Roberts v. Karr*, 2 Camp. 262. (n). The question of dedication depends upon the time and nature of the enjoyment of the passage over the land; therefore, where the plaintiff erected a street leading out of a highway across his own close and terminating at the edge of the defendant's adjoining close, which was separated by the defendant's fence from the end of the street, for twenty-one years (during nineteen of which the houses were completed, and the street

publicly watched, cleansed, and lighted, and both footways, and half the horseway, paved at the expense of the inhabitants), it was held, that this street was not to be presumed to be so dedicated to the public, as that the defendant, pulling down his own wall, might enter it at the end adjoining to his land, and use it as a highway. *Woodyer v. Hadden*, 5 Taunt. 125. It seems that there may be a limited dedication of a highway to the public; as a way excluding carriages, &c. *Marquis of Stafford v. Coyney*, 7 B. & C. 257. Trustees in whom land is vested for public purposes may lawfully dedicate the surface of it to the use of the public as a highway, if such use be not inconsistent with the purposes of their trust. *R. v. Leake*, 5 B. & Ad. 469. Accord. *Surrey Canal Company v. Hall*, 1 M. & G. 392. If a person opens his land, so that the public pass over it continually, they will, after a very few years, be entitled to pass over it and use it as a way; and if the owner does not mean to dedicate it as a way, but only to give a licence, he should do some act to show that he gives a licence only. *Trustees of British Museum v. Furness*, 5 C. & P. 460. It has been held in one case, that six years are sufficient to found the presumption of dedication; *Trustees of Rugby Charity v. Merryweather*, 11 East, 376. (a); and where the *locus in quo* had been in lease for a long term up to the year 1780, and from that year till the year 1788 the public were permitted to have the free use of it as a way, Lord Kenyon held it to be sufficient time for presuming a dedication. *S. C. Ibid.* Whether there be a dedication, or not, is always a question of intention, and may be disproved by the acts of the owner, or the circumstances under which the user has been permitted. *Barracough v. Johnson*, 8 A. & E. 99. If the land is in the possession of a tenant, such tenant cannot dedicate it to the public, so as to bind the owner of the fee. *Wood v. Veal*, 5 B. & A. 454. But after a long lapse of time, and a frequent change of tenants, Lord Ellenborough said, that, from the notorious and uninterrupted use of a way by the public, he should presume that the landlord had notice of the way being used, and that it was so used with his concurrence. *R. v. Barr*, 4 Camp. 16. *Antè*, p. 22. Where a public footway over Crown land was extinguished by an inclosure act, but for twenty years after the inclosure took place the public had continued to use the way, it was ruled that this user was no evidence of a dedication to the public, as it did not appear to have been with the knowledge of the Crown. *Harper v. Charlsworth*, 4 B. & C. 574. And *quære*, if such dedication can be presumed against the Crown?

Since the last Highway Act, 5 & 6 W. 4. c. 50. s. 23., a way can no longer be dedicated so as to make the parish liable to repairs, unless certain formalities therein pointed out have been complied with. But the act is not retrospective; *R. v. Westmark*, 2 M. & Rob. 305. And it seems that, notwithstanding this act, and the stat. 43 G. 3. c. 59. s. 5. as to the dedicating of bridges, such dedication may still be made, though the parish or county will not be liable to repairs. *Surrey Canal Company v. Hall*, 1 M. & G. 392.

[*Presumption of the duration for life.*] As to persons of whom no account can be given, the presumption of the duration of life ends at the expiration of seven years from the time when they were last known to be living. *Per Lord Ellenborough, Doe v. Jesson*, 6 East, 84.; *Doe*

2. Deakia, 4 B. & A. 433. Proof by one of a family, that, many years before, a younger brother of the person last seised had gone abroad, that the reputation in the family was that he had died there, and that the witness had never heard in the family of his having been married, is presumptive evidence of his death without issue. *Doe v. Griffin*, 15 East, 293. So where a person is shown to have been in existence a long time ago, as 100 years, his death unmarried and without issue will be presumed in the absence of any evidence to the contrary. *Doe v. Wolley*, 8 B. & C. 22. Proof that a person sailed in a ship bound for the West Indies two or three years ago, and that the ship has not since been heard of, is presumptive evidence that the person is dead; but the time of the death, if material, must depend upon the particular circumstances of the case. *Watson v. King*, 1 Stark. 121. See post, "Assumpsit on Policy of Insurance." The fact of the party being alive or dead at any particular period within, or at the end of, the seven years, must be proved by the party asserting that fact. *Doe v. Nepean*, 5 B. & Ad. 86.; *S. C. on error*, 2 M. & W. 894.

Presumption as to the legality or regularity of acts and appointments.] Where a feoffment has been proved, livery of seisin may be presumed after twenty years, if possession has gone along with the feoffment; *Biden v. Loveday*, cited 1 Vern. 196., *Rees v. Lloyd*, Wightw. 123.; but a less time than twenty years is not sufficient. *Doe v. Marquis of Cleveland*, 9 B. & C. 864. A person will not be presumed to have committed an unlawful act: therefore, when performances appeared to have taken place at a theatre, a licence was presumed in an action against a performer for not acting. *Rodwell v. Redge*, 1 C. & P. 220. But where the act directing the licence, likewise directs that a notice of it shall be painted on the outside of the house, and there is no such licence painted, it will be presumed, in an action for the penalty, that there is no licence. *Gregory v. Tuff*, 6 C. & P. 271. When a man has been elected to a corporate office, the presumption is that he has taken the sacrament according to law. *R. v. Hawkins*, 10 East, 211. And generally, it may be laid down that illegality is not presumed; per Bayley B., in *Gleadow v. Atkin*, 1 C. & M. 418.; at least in a suit *inter alios*, or any collateral proceeding. See post, "Onus Probandi." So a fact may be presumed from the regular course of a public office: thus, where it was proved that the custom-house would not permit an entry to be made, unless there had been an indorsement on a licence, it was held, (the licence being lost,) that from this entry the indorsement might be presumed. *Butler v. Alnutt*, 1 Stark. 222. So the fact of a person acting in an official capacity, as a surrogate, is *prima facie* evidence that he is duly appointed and has competent authority. *R. v. Verelst*, 3 Camp. 432. So of other public officers, though the appointment is in writing, as in the case of justices of the peace, constables, &c. *Berrymann v. Wise*, 4 T. R. 366. *Doe v. Haddon*, 3 Doug. 310. So where a constable has been appointed by commissioners under a local act. *Butler v. Ford*, 1 C. & M. 662. And the fact is evidence even as between third parties, and in his own favour. *S. C.* So where it is necessary to prove the swearing of an affidavit before a commissioner, evidence of his acting as such is sufficient. *R. v. Howard*, 1 M. & Rob. 187. Similar proof of a party's appointment as vestry clerk; *McGahey v. Alton*,

boundaries of which are in dispute, is unnecessary. But where the right is really public, a claim of highway, for instance, in which all the king's subjects are interested, it seems difficult to say that there ought to be any such limitation. In a matter in which all are concerned, reputation from any one appears to be receivable, but of course it would be almost worthless unless it came from persons who are shown to have some means of knowledge, as by living in the neighbourhood, or frequently using the road in dispute. *Per* Parke B. in *Crease v. Barrett*, 1 C. M. & R. 919. Thus a document purporting to be a decree of certain persons, the Lord Treasurer and Chancellor of the Exchequer, &c., who had no authority as a court, was held to be inadmissible evidence as reputation, on a question whether the city of Chester, before it was made a county of itself, formed a part of the county palatine; because those personages had from their situations no peculiar knowledge of the facts. *Rogers v. Wood*, 2 B. & Ad. 245. So the answers of the tenants of a manor to an old commission of survey issued by the lord, finding the bounds of the manor and his right to wreck, are evidence of the former; but not of the latter; they having no peculiar means of knowledge, and the lord's title not being a matter of public concern. *Talbot v. Lewis*, 1 C. M. & R. 495. A document, *tempore* Eliz., produced from the office of the duchy of Lancaster, purporting to be a survey of a duchy manor taken by the deputy surveyor-general by the oaths of twenty tenants of the manor whose names were subscribed, was held inadmissible evidence of the bounds of the manor, there being no proof of the authority under which the survey was taken, and, consequently, no ground for presuming that any such survey was in fact made. *Evans v. Taylor*, 7 A. & E. 617. But ancient answers of the customary tenants of a manor, stating the rights of the lord of the manor to all mines within it, are evidence even against the freeholders. *Crease v. Barrett*, 1 C. M. & R. 919.

In order to the admission of evidence of reputation, it is not necessary that the fact of user should be shown; *Crease v. Barrett*, *supra*; although there are cases in which it has been so considered. See *Weeks v. Sparke*, 1 M. & S. 686. *Rushworth v. Craven*, M.C. & Y. 417., *antè*, p. 29.

These declarations, as in questions of pedigree, must not have been made *post litem motam*; *R. v. Cotton*, 3 Camp. 444. But where, in a suit as to the custom of a manor, depositions in a former suit, relative to a custom of the same manor, were offered in evidence, it was held no objection that the depositions taken in the former suit were *post litem motam*, if the two suits were not upon the same custom; and where the former suit was very ancient, it was held unnecessary to prove by extrinsic evidence that the witnesses who made the depositions were in the situation in which they professed to stand, or that they had the means of becoming acquainted with the customs of the manor. *Freeman v. Phillips*, 4 M. & S. 486. But see *Banbury Peerage case*, *antè*, p. 27, 28. Declarations of old persons concerning the boundaries of parishes and manors have been admitted in evidence, though they were parishioners, and claimed right of common on the wastes, which their declarations had a tendency to enlarge. *Nicholls v. Parker*, 14 East, 331. *Plaxton v. Dare*, 10 B. & C. 19. So declarations on a question of parochial modus were received, though the deceased was

a parishioner and liable to pay tithe. *Harewood v. Sims*, 1 *Wightw.* 112, *Deacle v. Hancock*, *M'Clel.* 85., *S. C.* 13 *Price*, 226. So a written declaration of a deceased corporator seems to be evidence in support of a custom to exclude foreigners, though he could not have been called if alive. *Davies v. Morgan*, 1 *C. & J.* 587.

The declaration of an old person, *still alive*, cannot be admitted as proof of reputation. *Per Patterson J.*, *Woolway v. Rowe*, 1 *A. & E.* 117.

Hearsay admissible when part of the transaction.] When hearsay is introduced, not as a medium of proof in order to establish a distinct fact, but as being in itself a part of the transaction in question, and explanatory of it, it is admissible. Thus, in a case for a false representation of the solvency of A. B., whereby the plaintiffs trusted him with goods, their declarations at the time, that they trusted him in consequence of the representation, are admissible in evidence for them. *Fellowes v. Williamson*, *M. & M.* 306. So in an action against the drawer of a bill of exchange, what is said by the drawee, on the bill being presented when due, is evidence; but what passed between the drawee and the holder afterwards is not admissible. *Prideaux v. Collier*, 2 *Stark.* 57. A letter sent by plaintiff to defendant with the bill of exchange on which defendant is sued, may be read for the plaintiff; *Bruce v. Hurly*, 1 *Stark.* 24.; and see *Kent v. Lowen*, 1 *Camp.* 177. To prove that there was a good consideration for a conveyance, the verbal instructions of the alienor to his solicitor to prepare it, are good evidence. *Tull v. Parlett*, *M. & M.* 472. So declarations, made by a trader at the time of his absentsing himself from home, are admissible on a question as to his bankruptcy, to show the motive of his absence, *Bateman v. Bailey*, 5 *T. R.* 512. In an action to recover money paid by a bankrupt in contemplation of bankruptcy, his declarations as to the state of his affairs, made about the time of the transaction, but unconnected with it, are admissible for the plaintiff. *Vacher v. Cocks*, *M. & M.* 358. *Herbert v. Wilcocks*, *Id.* 355. (n). So in an action to recover fraudulent payments, answers to letters written by the bankrupt, requesting assistance, may be read to prove the refusal to give assistance, and his consequent knowledge of the state of his affairs. *Vacher v. Cocks*, *supra*. And see generally, as to declarations by bankrupts, *post*, tit. "*Actions by Assignees of Bankrupts*." A trader being in embarrassed circumstances, executed an assignment of all his "effects, stock, books, and book-debts," for the benefit of his creditors: in an action after his death against the assignee, as executor *de son tort*, it was held that a list of creditors, made out by the direction of the assignor, about the time of the execution of the assignment, was evidence for defendant, for the purpose of disproving fraud. *Lewis v. Rogers*, 1 *C. M. & R.* 48.; *S. C.* 4 *Tyr.* 872.

Where felling timber is offered as evidence of ownership, the declarations of the party so employed, as to the property being in another, are evidence to rebut it. *Per Parke B.*, *Doe v. Arkwright*, 5 *C. & P.* 575. So in actions of assault, evidence of what the plaintiff said immediately on receiving the hurt, is admissible for him. *Thompson v. Trevanion*, *Skin.* 402. So the declarations of a plaintiff made in a conversation with the defendant, if part of the *res gesta*, are admissible for the plaintiff as part

of his evidence. *Haylep v. Gymer*, 1 A. & E. 162. But an act done cannot be qualified by insulated declarations made afterwards *ab initio*. Thus the schedule of an insolvent, delivered four months after execution of a deed, is not admissible on behalf of the assignees to show that it was executed with intent to petition. *Peacock v. Harris*, 5 A. & E. 449. And a declaration by the obligee, as to the application of previous payments made to him by the obligor, is not evidence as between the sureties. *Dunn v. Slee*, Holt N. P. 401. In an action for criminal conversation, the declarations of a wife at the time of her elopement, that she fled from terror of personal violence from her husband, seem to be evidence against him. See *Aveson v. Kinnaird*, 6 East, 193. And where in a similar action the defence was, that the plaintiff had connived at his wife's elopement, evidence was received, on behalf of the plaintiff, of the wife's declaration as to her intention in going. *Hoare v. Allen*, 3 Esp. 276. So letters written by her testifying affection for her husband, are also evidence for him. *Willis v. Bernard*, 8 Bing. 376. Where a will is disputed on the ground of fraud, circumvention, or forgery, declarations of his intention by the testator are admissible. *Doe v. Hardy*, 1 M. & Rob. 525.

It is not every declaration that is receivable in evidence, merely because it accompanies an act done by the speaker. Thus, where the object is to establish a public way by reputation, it is no legitimate evidence to prove that the tenant of land near the way planted a tree, and, whilst doing so, stated that he did it "to show the boundary of the road." *R. v. Bliss*, 7 A. & E. 550. The admissibility of the declaration depends, not merely on its accompanying an act, but on the light which it throws upon an act which is, in itself, relevant and admissible evidence. See the opinions of the Judges in *Wright v. Doe d. Tatham*, 7 A. & E. 313.; S. C. 4 New Ca. 489.

[Character.] Where character is in issue, hearsay evidence of the representations of third persons is admitted. *Foulkes v. Sellway*, 3 Esp. 286.

[Assertions of ownership.] Under the head of hearsay are usually classed those cases in which expired leases, or other documents of a similar kind, asserting a right on the part of the maker, have been admitted as evidence of that right in favour of persons claiming under them: they are in fact acts of ownership, and, as such, evidence of property. Thus old leases of fishing places by the lord of an adjacent manor are evidence of a right to the bed of the river in favour of those who claim under him. *Hale de Jure Maris*, p. 35. Where the question was, whether certain lands within a manor were subject to a right of common, counterparts of old leases preserved among the muniments of the lord of the manor, from which it was inferred that the land was demised by the lord free from such charge, were allowed to be evidence for the plaintiff claiming under him, though possession under the leases was not shown. *Clarkson v. Woodhouse*, 5 T. R. 412. (n.); S. C. 3 Doug. 189. So old entries of licences on the court-rolls of a manor, stating that the lords of the manor had the several fishing in a navigable river, and for certain rents had granted liberty of fishing, were held admissible to prove a prescriptive right in

the plaintiffs claiming under the lords of the manor, without proof of payment under the licences: but such evidence is not entitled to any weight unless it be shown that in later times payments have been made under similar licences, or that the lords of the manor have exercised other acts of ownership which have been acquiesced in. *Rogers v. Allen*, 1 Camp. 309. So an old table of tolls kept by the town clerk of a corporation, by which the lessees of the tolls had always been guided in their collection, is admissible in favour of the claim of toll by the corporation; *Brett v. Beales*, M. & M. 419.; *R. v. Carpenter*, 2 Show. 48.; but mere entries in the corporation books of orders to grant leases, appointments of commissioners to manage them, &c., are not evidence. *Brett v. Beales*, M. & M. 429., and *S. C. & M. & R.* 433. 436. So an old entry of a resolution in the books of an eleemosynary corporation, being lay impropiators of tithes, that the tithe shall, on default of payment of the accustomed payment in lieu of tithe, be taken in kind, is not evidence for them against a claim of modus, without proof that tithe in kind had in fact been taken in pursuance of such order. *Att. Gen. v. Cleve*, *Somerset Sum. Ass.*, 1841, per Rolfe B. And generally what any one writes or says in his own favour cannot be evidence for himself or his representative. *Glyn v. Bank of England*, 2 Vca. 43. *R. v. Debenham*, 2 B. & A. 187. Therefore entries made by a deceased person, under whom the defendant claims, acknowledging the receipt of his rent for the premises in question, are not admissible for the defendant in proof of his title to them. *Outram v. Morewood*, 5 T. R. 123. So on a question whether the appointment of a curate belongs to the vicar or to a corporation, entries in old books belonging to the corporation are not evidence for them. *Att. Gen. v. Corporation of Warwick*, 4 Russ. 222. So a survey of a manor made by the owner is not evidence against a stranger in favour of a succeeding owner; *Anon.* 1 Stra. 95.; but where A. seised of the manors of B. and C., causes a survey to be taken of the manor of B., which is afterwards conveyed to E., and, after a long time, there are disputes between the lords of the manors of B. and C. about their boundaries, this old survey may be given in evidence. *Bridgman v. Jennings*, 1 Ld. Raym. 734. So property may be identified by the books of the deceased steward of a person from whom both plaintiff and defendant derive title. *Doe v. Seaton*, 2 A. & E. 171.

Hence it appears that mere private declarations of right, coupled with no act or visible exercise of it proved or presumable, are inadmissible as evidence in favour of the right asserted. As to acts of ownership, see *post tit. Quare clausum fregit*.

Declarations of persons having no interest to misrepresent.] On this ground entries by a deceased rector, or vicar, as to the receipt of ecclesiastical dues, are admissible for his successor. *Legross v. Levemoor*, 2 Gwill. 529. *Armstrong v. Hewitt*, 4 Price, 218. And even where the entries have been made by deceased impropriate rectors, they have been admitted as evidence for their successors, though objected to as coming from the owners of the inheritance. *Anon. Bunb.* 46. *Illingworth v. Leigh*, 4 Gwill. 1618. So they are admissible, though the impropriator be a corporation aggregate; therefore old rolls of account, showing receipts by the tithe collectors of the college of vicars-choral,

Exeter, were admitted as evidence for them against a claim of modus. *Short v. Lee*, 2 J. & W. 478. But the reception of this evidence has given rise to much observation, and is to be regarded as an exception to general rules. See the cases cited, 1 Phil. Evid. 247. (n).

[*Declarations of witnesses at a former trial.*] Where a witness was examined in a former action on the same point between the same parties, his testimony may be proved, if he is since dead; *B. N. P.* 242.; or if he appears to be kept away by contrivance. *Green v. Galewick*, *ib.* 243. It seems to be enough if the parties to the two actions are substantially, though not nominally, the same; as where the lessor of plaintiff in the second, was joined with other lessors in the former action. *Wright v. Doe d. Tatham*, 1 A. & E. 18, 19. So if the parties and the title in issue are the same, the evidence is admissible, though the land sought to be recovered is different. *Doe d. Foster v. Derby*, 1 A. & E. 791. (note). But where the parties are neither the same, nor in privity with each other, such testimony is not admissible, though the original title, and one of the parties, may be the same. *S. C. ibid.* 783. The former testimony must be proved either by the judge's notes, or by the evidence of a person who can repeat the words of the witness. *Ennis v. Donisthorpe*, 1 Phill. Ev. Part 1. ch. 7. § 7. *Mayor of Doncaster v. Day*, 3 Taunt. 262. *Crease v. Barrett*, 1 Tyr. & Gr. 112. See post, "*Proof of Depositions.*"

[*Hearsay of persons speaking against their own interest admissible.*] In a variety of cases the declarations of deceased persons, made against their own interest, have been admitted. See the cases collected, *Barker v. Ray*, 2 Russell's Rep. 67. (n). And they are said to be admissible as evidence of all the facts there stated, though some of them may not have been within the party's own knowledge; for the whole declaration must be taken together. *Crease v. Barrett*, 1 C. M. & R. 919. One of the leading cases is that of *Higham v. Ridgway*, 10 East, 109., where the time of a child's birth was proved by production of the book of the deceased man-midwife referring to his ledger, in which ledger his charge for attendance was marked as paid. See also *Gleadow v. Atkin*, 1 C. & M. 424., by which it appears that such an entry would be admissible, though the party, if living, could not have been examined. Accord, *Short v. Lee*, 2 J. & W. 489. Entries by a deceased steward of money received by him from different persons in satisfaction of trespasses committed on the waste, and thereby charging himself to the amount received, are admissible to prove that the right to the soil of the waste was in his master. *Barry v. Bebbington*, 4 T. R. 514. And if the entries be ancient, and the document comes from the proper custody, the handwriting need not be proved. *Wynne v. Tyrwhitt*, 4 B. & A. 376. So a bill of lading signed by a deceased master of a vessel for goods deliverable to a consignee, is evidence of property in the consignee, even in trover for the goods against a third person. Per Lawrence J., *Haddow v. Parry*, 3 Taunt. 305. Receipts of rent by a steward, specifying the tenure of the land in respect of which it is paid, are evidence of the tenure. *Doe d. Harpur v. Dodd*, 3 Wooddeson Comm. 332. In an action against a co-surety for contribution, a receipt given by the deceased creditor, professing to acknowledge a payment by the

plaintiff of a sum of money, "originally advanced to E. H." is evidence, not only of the payment, but also of the original advance to E. H. as principal. *Davies v. Humphreys*, 6 M. & W. 153.

A declaration by a deceased occupier of land that he rents it under a certain person, is evidence of that person's seisin; *Uncle v. Watson*, 4 Trast. 16.; even in a writ of right, to prove the seisin by taking essoins. *Carne v. Nicoll*, 1 New Ca. 430. The principle is, that, occupation being presumptive evidence of a seisin in fee, any declaration, claiming a less estate, is against the party's interest. *Crease v. Barrett*, 1 C. M. & R. 931. A deed by a deceased party, shown to be in the receipt of the rents and profits, in which S. is stated to be the legal owner in fee, is evidence of such ownership for a party claiming under S. *Doe v. Coulthred*, 7 A. & E. 235. So a written attornment to L. by a tenant in possession, is evidence of L.'s seisin. *Doe v. Edwards*, 5 A. & E. 95.

Entries made by a deceased collector of rates, charging himself with the receipt of money, and made by him in the public books of his office, are admissible against his surety to prove the receipt. *Goss v. Watlington*, 3 B. & B. 132. And the same has been held with regard to the entries of a clerk. *Whitnash v. George*, 8 B. & C. 556. So entries in the land-tax collector's book, stating A. B. to be rated for a particular house, and his payment of the sum rated, are evidence to show that A. B. was occupier of the premises at the time. *Doe v. Cartwright*, R. & M. 62. See also *Doe v. Seaton*, 2 A. & E. 171. So entries made by a deceased collector of taxes in a private book, charging himself with the receipt of money, are evidence against a surety of the receipt of the money, though the parties who paid it are alive and might be called. *Middleton v. Melton*, 10 B. & C. 317. It seems, that the entries of receipts by a deceased accountant are admissible, though the balance may be in his own favour; per *Patteson J.*, *Williams v. Graves*, 8 C. & P. 593.; and ancient ministers' accounts, rendered to the lord of a manor, and debiting themselves with the issues and profits of the manor, are admissible evidence in favour of a successor, though the roll contains a quietus at the end of it; per Lord Denman C. J. in *Brune v. Thomson*, London sittings after M. T. 1841, and *Erskine J.* *S. C. Bodmin Sp. Ass.* 1842. But if the party who made the entry be alive, though out of the jurisdiction of the court so that he cannot be called, the proof of the entry is inadmissible. *Stephen v. Gwenap*, 1 M. & Rob. 121. Where plaintiff shewed payment of rent to A. B. in order to prove a tenancy under him, and not under defendant, defendant was not allowed to rebut the evidence by producing written accounts, rendered by A. B. to him, of these very rents; A. B. being alive, and not called. *Spargo v. Broun*, 9 B. & C. 935.

On the subject of the doctrine in *Higham v. Ridgway* (antè, p. 34.), it was observed by Littledale J., in *Doe v. Vowles*, 1 M. & Rob. 261., that "the cases had gone far enough," and where it was attempted to prove the possession of a house at a certain time by producing a deceased tradesman's bill for repairs with his receipt on it, found among the papers of the party charged, and there was no other proof that the work was done, Littledale J., rejected it. In *Fursdon v. Clogg*, *Excheq. M. T.* 1841, the point was argued whether the oral declaration of a deceased collector, made when paying over money to his

landlord's steward, that he received it from A. B., is evidence of a payment by A. B.? The point was considered as unsettled, and no judgment has yet (*E. T.* 1842), been delivered.

The declarations of persons who, at the time of making them, stood in the same situation and interest as the party to the suit, are evidence against that party; thus the declaration of a former owner of plaintiff's land, that he had not the right claimed by plaintiff in respect of it, is admissible. *Woolway v. Rowe*, 1 A. & E. 114. They are admissible though the maker is alive, and not produced, *S. C.* So the landlord's description of property in a former lease is evidence against a subsequent lessee, but not against a prior lessee. *Crease v. Barrett*, 1 C. M. & R. 919. And a declaration in an answer in Chancery by one who has sold property, is not evidence against a person claiming under him by a conveyance long anterior to the bill filed. *Gully v. Bishop of Exeter*, 5 Bing. 171. The declarations of tenants are not evidence against reversioners, though their acts are. *Per Patteson J., Tickle v. Brown*, 4 A. & E. 378.

Declarations of parties, identified in interest with those against whom they are offered, are in the nature of admissions, and as such belong rather to the next head of evidence.

Hearsay of persons making entries, &c. in the regular discharge of their duty.] Where an entry or declaration is made by a disinterested person in the course of discharging a professional or official duty, it is, in general, admissible after the death of the party making it. Thus a notice, indorsed or served by a deceased clerk in an attorney's office whose duty it was to serve notices, is evidence of service. *Doe v. Turford*, 3 B. & Ad. 890. An attorney's bill with an indorsement upon it, "March 4. 1815, delivered a copy to C. D.," which is proved to be in the handwriting of a deceased clerk, whose duty it was to deliver a copy of the bill, and proved to have existed at the time of the date, has been held to be evidence to prove the delivery of the bill. *Champneys v. Peck*, 1 Stark. 404. Best C. J., is said to have been of opinion, that a banker's ledger was receivable in evidence in an action between the assignees of a customer and a third party, to show that the customer at a certain time had no funds in the banker's hands, without calling the clerks. *Furness v. Cope*, 5 Bing. 114. An entry of dishonour of a bill, made by a notary's clerk in the usual course of business, is evidence of the fact of dishonour after the clerk's decease. *Poole v. Dica*, 1 New Ca. 649. In *Marks v. Laher*, 3 New Ca. 408., an entry by the plaintiff's attorney's clerk in a day-book, stating a tender and refusal by the defendant, was held evidence of a replication to that effect; but there was a previous entry of a receipt by him of the money for the purpose of such tender.

Upon the same principle, contemporaneous entries by a deceased shopman, or servant, in his master's books in the ordinary course of business, stating the delivery of goods, are evidence for his master of such delivery. *Price v. Lord Torrington*, 1 Salk. 285. *Pritt v. Fairclough*, 3 Camp. 305.; and cases cited by Parke J., *Doe v. Turford*, 3 B. & Ad. 898. In order to render such entries evidence, it must appear that the shopman is dead; that he is abroad and not likely to return is not sufficient. *Cooper v. Marsden*, 1 Esp. 1.

By stat. 7 Jac. 1. c. 12., the shop book of a tradesman shall not be

evidence in any action for wares delivered, or work done, above one year before the bringing of the action, except the tradesman or his executor shall have obtained a bill of debt or obligation of the debtor for his said debt, or shall have brought against him some action within a year next after the delivery of the wares, or the work done. By sect. 2. the act is not to extend to traffic or dealing between merchant and merchant, merchant and tradesman, or tradesman and tradesman, for any thing within the compass of their mutual trades and merchandize.

But though an entry made in the course of office, reporting facts necessary to the performance of a duty, may be admissible; yet the statement in it of other extraneous circumstances, however naturally they may find a place in the narrative, is no proof of those circumstances. Thus a return by a sheriff's officer of an arrest at a specified place is not evidence as to the place of arrest. *Chambers v. Bernasconi*, 1 C. M. & R. 368.

As to entries in public books, registers, &c., see post, "Effect of Evidence."

ADMISSIONS.

The express admissions of a party to the suit, or admissions implied from his conduct, are evidence against him; but he is at liberty to prove that such admissions were mistaken or untrue, except in cases of estoppel. *Per Bayley J., Heane v. Rogers*, 9 B. & C. 586.

Admissions, made with a view to a compromise and in order "to buy peace," are not evidence against the maker. *B. N. P.* 236. But an acknowledgment of a party's handwriting, though made pending a treaty of compromise, is evidence against him. *Waldridge v. Kennison*, 1 Esp. 143. So, an admission of facts before arbitrators. *Gregory v. Howard*, 3 Esp. 113. An offer of a specific sum by way of compromise is evidence, unless accompanied with a caution that the offer is confidential or without prejudice. *Wallace v. Small*, M. & M. 446.

It is no objection to the proof of an admission that it was made under compulsive process: thus an answer to a bill in Chancery, filed against the defendant by a stranger, may be read against him to show the admission of a particular fact. *Grant v. Jackson*, Peake, 203. The examination of a party before commissioners of bankrupt is evidence against him; *Robson v. Alexander*, 1 M. & P. 448.; though part only of his deposition was noted down. *Milward v. Forbes*, 4 Esp. 172. So, testimony given in court may be used in an action against the witness, though he was prevented from entering into an explanation of the circumstances under which the fact took place, it being irrelevant. *Collett v. Lord Keith*, 4 Esp. 212. So, though the compulsory power was illegally exercised. *Stockfeth v. De Tastet*, 4 Camp. 10. So, on process to compel attendance before the House of Commons. *R. v. Mercer*, 2 Stark. 366. But such compulsive admission is no evidence of an account stated. *Tucker v. Barrow*, 7 B. & C. 623. An acknowledgment by a defendant, that his trade is a nuisance, is admissible, though not conclusive, evidence against him on an indictment for carrying on the same trade in another place. *R. v. Neville*, Peake, 91. If A., having title to premises in the possession of B., suffer B., to make alterations inconsistent with such title, it is evidence to go to the jury that A. has recognised the right of B. and has done such acts as are neces-

sary to confirm it. *Doe v. Pye*, 1 *Esp.* 364. So where, upon a building lease of fifty-nine feet, more or less, the lessee took sixty-two feet and a half, but the ground taken agreed with the abutments in the lease, and the lessor marked out the ground and saw the progress of the defendant's building without objection, this is evidence of an acquiescence in the lessee's title. *Neale v. Parkin*, 1 *Esp.* 229. And in an action for debt, evidence that the plaintiff has taken the benefit of the Insolvent Debtors' Act, and not inserted the debt in question in his schedule, is an admission, as against him, of its not being due. *Nickolls v. Downes*, 1 *M. & Rob.* 13. Letters written by a party are evidence against him, without producing those to which such letters are answers. *Lord Barrymore v. Taylor*, 1 *Esp.* 326. But such letters are not evidence in favour of the writer, except in proof of a notice, or a demand. *Richards v. Frankum*, 9 *C. & P.* 221.

Though the contents of a written instrument cannot, in general, be proved without production of it (see *ante*, p. 1.); yet what a party to the record says, is primary against himself as an admission, though it relates to the contents of a written paper or deed, and though the contents be directly in issue in the cause. *Slatterie v. Pooley*, 6 *M. & W.* 664. See *Fox v. Waters*, 12 *A. & E.* 43. So a parol admission of a debt is evidence on an account stated, though it refers to a written instrument not produced. *Newhall v. Holt*, 6 *M. & W.* 662. A defendant in ejectment may prove an admission of the lessor of the plaintiff that he had sold and assigned his lease to a third person, though such assignment must be in writing. *Doe v. Watson*, 2 *Stark.* 230. A notice signed by partners, stating that the partnership "has been dissolved," is evidence against them of the dissolution, though the partnership was by deed. *Doe v. Miles*, 1 *Stark.* 181. *S. C.* 4 *Camp.* 373. But an admission, in an answer in Chancery of the execution of a deed, is only secondary evidence, and does not supersede the necessity of proving it in the regular way. *Call v. Denning*, 4 *East*, 53. *Cunliffe v. Sefton*, 2 *East*, 187, 188. But see *Bowles v. Langworthy*, 5 *T. R.* 366., and *Slatterie v. Pooley*, *supra*. So with regard to matters of record and judicial proceedings, as the insolvency and discharge of the plaintiff. *Scott v. Clare*, 3 *Camp.* 236. But this objection does not apply where the party enters into a formal admission with a view to a trial of the cause; and it seems doubtful, from the above case of *Slatterie v. Pooley* and from the cases respecting admissions of the title of the assignees of bankrupts, cited *post*, p. 40., whether *Scott v. Clare* is to be considered as law.

Admissions may sometimes be presumed from the silence or conduct of a party when certain statements are made: on this ground it is that the statements of any one in the presence and hearing of the party against whom they are offered are evidence. But the deposition of a witness, taken in a judicial proceeding against a party, is not evidence in another proceeding against that party merely on the ground that he was present, and did not cross-examine the witness; *Melen v. Andrews*, *M. & M.* 336.; for the nature of a judicial proceeding prevents a party from interposing to contradict or comment on the statement of a witness, as he would in common conversation. Accord. *per Alderson, B.*, in *Short v. Sloy*, *Winton Sum. Ass.* 1836.

Where the plaintiff sued as administrator, during the absence of the executor abroad (under 38 *G. S. c. 87.*), Lord Denman C. J.,

refused to admit the declarations of the executor as evidence against the plaintiff. *Rush v. Peacock*, 2 M. & Rob. 162. And in an action by assignees of a bankrupt, admissions made by them before their appointment were held inadmissible against them in their character of assignees. *Fenwick v. Thornton*, M. & M. 51. But Tindal C. J., admitted their declarations, stating that he was not aware of any distinction between the admissions of parties suing in a representative character and in their own right. *Smith v. Morgan*, 2 M. & Rob. 257. In an action by a bankrupt against his assignees to try the validity of his commission, depositions of deceased persons taken under the commission and inrolled by the assignees, are not evidence against them as admissions by reason of such inrollment. *Chambers v. Bernasconi*, 1 C. M. & R. 347. Where a covenantor and covenantee submitted the amount of damages or a breach of covenant to arbitration, in an action on the covenant the award was held a conclusive admission of the amount of damages, *Whitehead v. Tattersall*, 1 A. & E. 491.

As to admissions by parties identified in interest, see *antè*, tit. "Hearsay," p. 36.

Receipts.] The acknowledgment, in a deed, of the receipt of money, is conclusive evidence, as between the parties to it, of such receipt. *Baker v. Dewey*, 1 B. & C. 704. *Rowntree v. Jacob*, 2 Taunt. 141. But such receipt will not be conclusive, where the recitals of the deed show only an "agreement to pay," and the receipt is of money "so paid as above mentioned;" as is usually done in purchase deeds. *Boltrell v. Sammers*, 2 Y. & J. 407. *Lampon v. Corke*, 5 B. & A. 607. Nor is the receipt indorsed on the back of a deed conclusive. *Straton v. Rastall*, 2 T. R. 366. In general, a receipt not under seal is only a *prima facie* acknowledgment that the money has been paid; and therefore may be contradicted or explained. *Graves v. Key*, 3 B. & Ad. 318. It was however held, both by Lords Kenyon and Ellenborough, that a receipt in full of all demands, given with a knowledge of all the circumstances, is conclusive, though there was no payment in fact. *Bristow v. Eastman*, 1 Esp. 172. *Alner v. George*, 1 Camp. 392. A receipt given in such a case seems, in fact, to be equivalent to an executed gift of the money. *Semb. Bramston v. Robins*, 4 Bing. 11. As between the underwriter and the assured, the acknowledgment in the policy of the receipt of the premium, by the broker, is conclusive; *Dalsell v. Mair*, 1 Camp. 532.; unless there has been a fraud practised by the assured, to induce the broker to give credit to him. *Foy v. Bell*, 3 Taunt. 493. If an agent, employed to receive money and bound by his duty to his principal to communicate to him whether the money is received or not, renders an account, from time to time, which contains an intentional mis-statement that the money has been received, he is so far bound by that account that he cannot make his principal refund monies paid on such account. *Shaw v. Picton*, 4 B. & C. 729. *Skyring v. Greenwood*, *ib.* 281.

Admissions implied from the acts of the party.] The plaintiff's title to sue, or the character in which the plaintiff sues, or in which the defendant is sued, is frequently admitted by the acts and conduct of the opposite party; and in some cases the admission, though not strictly

an estoppel, is conclusive. Thus, if B. has dealt with A. as farmer of the post-horse duties, it is evidence in an action by A. against B., to prove that he is such farmer. *Radford v. McIntosh*, 3 T. R. 632. And see *Peacock v. Harris*, 10 East, 104. So in an action for slander, importing that the defendant would have the plaintiff struck off the roll of attorneys, were held to be an admission of the plaintiff's character as attorney. *Berryman v. Wise*, 4 T. R. 366. *Pearce v. Whale*, 5 B. & C. 39. In an action for penalties against a collector of taxes, proof of the defendant having collected the taxes is sufficient proof of his being collector, though the appointment is by warrant under an act of parliament. *Lister v. Priestley*, Wightw. 67. So payment of tithes by a parishioner to the plaintiff, is evidence against the former of the plaintiff's title to the living. *Chapman v. Beard*, 3 Anstr. 942. But subscription of a paper, as witness, is not in itself proof of an admission of its contents. *Harding v. Crethorn*, 1 Esp. 58. An admission by a defendant that a third person has become bankrupt, as where an auctioneer advertised for sale "the property of J. S., a bankrupt," is evidence of the title of the assignees in an action brought by them against the auctioneer. *Mallby v. Christie*, 1 Esp. 340. And such an admission is evidence on a plea denying the title of the assignees. *Inglis v. Spence*, 1 C. M. & R. 432. So where the defendant, with a view to obtaining a commission against the party, swore an affidavit stating that he had become bankrupt. *Ledbetter v. Salt*, 4 Bing. 623. So it has been held, that a bankrupt, who has petitioned for his discharge under stat. 49 G. 3. c. 121. s. 14., cannot, in an action against his assignees, dispute the validity of the commission. *Watson v. Wace*, 5 B. & C. 153. But where the admission, that he has become bankrupt, is made in the course of a transaction with third persons, the bankrupt is not thereby estopped from showing, in an action against his assignees, that he has not become bankrupt. *Heane v. Rogers*, 9 B. & C. 577. Nor is he precluded from disputing the commission by surrendering, or by petitioning the Chancellor to enlarge the time for surrendering; *Mercer v. Wise*, 3 Esp. 219.; nor by having applied to a commissioner to appoint an official assignee, for investigating the petitioning creditor's debt, &c. *Munk v. Clark*, 2 New Ca. 299. So, as against a creditor, the merely proving a debt under the commission is not such an admission as will dispense with regular proof of the bankruptcy, when disputed. *Rankin v. Horner*, 16 East, 191. See post, tit. "Actions by assignees."

Admissions by trustees; or of persons not parties to the suit, but interested in it.] An admission is evidence whether made by a trustee, or nominal party, who sues for the benefit of another; *Bauerman v. Radenius*, 7 T. R. 664.; *Gibson v. Winter*, 5 B. & Ad. 96.; or by the person really interested in the suit, but not named on the record. Thus in an action on a bond conditioned for the payment of money to L. D., the declaration of L. D. that the defendant owes nothing is evidence. *Hanson v. Parker*, 1 Wils. 257. So in an action by the master of a ship for freight, brought for the benefit of the owner, the admissions of the latter are evidence. *Smith v. Lyon*, 3 Camp. 465. So in actions on policies, the declarations of the parties really interested are admissible. *Per Lord Ellenborough*, *Bell v. Ansley*, 16 East, 143. But where an action of

ejectment was brought by a trustee having the legal estate; and the defendant offered evidence of admissions made by the *cestui que trust* of a particular estate; it was considered doubtful whether such evidence could be received, inasmuch as the interest of the *cestui que trust* was not co-extensive with that of the lessor of the plaintiff, and the declarations were prejudicial to the remainderman. *Doe v. Wainwright*, 8 A. & E. 691. On an appeal against an order of removal the admissions of rated inhabitants of a parish are evidence against that parish. *R. v. Whitley*, 1 M. & S. 636. So in an action against the sheriff, the declarations of a party who has indemnified the sheriff are evidence against the defendant. *Dyke v. Aldridge*, cited 7 T. R. 665. So in trover for a deed, which the defendant admitted he detained at the request of W. R. and in the detainer of which W. R. was substantially interested, the declarations of W. R. in favour of the plaintiff's claim are admissible. *Harrison v. Vallance*, 1 Bing. 45.; and see *Robson v. Andrade*, 1 Stark. 372. So, the declarations of the party for whose benefit the plaintiff sues on a bill. *Welstead v. Levy*, 1 M. & Rob. 138. Or of a party from whom he received the bill or note when overdue. *Beauchamp v. Parry*, 1 B. & Ad. 89.

The declarations of a party, proved to be a joint contractor with the defendant, though not joined in the action, or though the co-contractor has been *not-prossed* on a plea of bankruptcy, are admissible. *Grant v. Jackson*, Peake, 203. *Wood v. Braddick*, 1 Taunt. 104. But admissions by co-trespassers, or joint defendants in actions for *tort*, are not generally evidence except against themselves, unless there be proof of a common motive and object, and the declarations relate to them. *Daniels v. Potter*, M. & M. 501.: and see the observations in *R. v. Hardwick*, 11 East, 578., and *Phillipps on Ev. P. 1, Ch. 5., Sec. 4.* Nor are they evidence in actions *ex contractu*, unless they relate to a matter in which there is a community of interest: thus where the plaintiff in covenant alleged an eviction by two defendants, under a prior lawful title; an admission by one of the defendants after eviction was held no evidence of such title, although the defendants were co-executors of the covenantor, and had joined in the eviction. *Fox v. Waters*, 12 A. & E. 43.

An admission by one of several trustees will not affect his co-trustees where they are not all personally liable. *Davies v. Ridge*, 3 Esp. 102. And an admission by an indifferent individual of a corporation is not evidence against the corporate body. *Mayor of London v. Long*, 1 Camp. 23. But where a corporation sues for a disturbance in exercising a corporate office, what is said by the officer respecting the exercise of it, is evidence against the corporation. *Id.* 25., per Lord Ellenborough.

Admissions by guardian, trustee, and prochein amy.] The admissions of a guardian are not evidence against an infant who sues by his guardian. *Cowling v. Ely*, 2 Stark. 366.; but see *James v. Hatfield*, 1 Stra. 548. Nor the admission of *prochein amy*. *Webb v. Smith*, R. & M. 106. Nor, as it is said, those of a trustee against a *cestui que trust*. *B. N. P.* 237. *Sed quære?*

Admissions by agents.] Where a party to the suit constitutes a third person his agent for the purpose of an admission, the admission so

an estoppel, is conclusive. Thus, if B. has the post-horse duties, it is evidence in support of it, such affidavit is prove that he is such farmer. *Radford v. Garnet v. Ball*, 3 Stark. 160.; and see *Peacock v. Harris*, 10 East, 117. In an action for the plaintiff in his profession of importing that the defendant was a roll of attorneys, were held to be in character as attorney. *Berryman v. Daniel v. Pitt*, 1 Camp. 366. (n). *Wid* In an action for the loss of a horse by a parishioner to plaintiff's title to a miner's jury should say the shaft if a finding of such a jury was evidence against defendant. *Sybray v. White*, 1 M. & W. 435. With the admissions of agents in general, the rule is this: When an agent to B., whatever A. does or says or writes, as agent of B., is admissible in evidence, of a contract which he makes for B., and which B.; but it is not admissible as the agent's account of Per Gibbs J., *Langhorn v. Allnutt*, 4 Taunt. 519. of a servant, employed to sell a horse, is evidence where the master with a warranty, if made at the time of sale; if at any other time, the facts must be proved by the servant himself. *Hawke*, 5 Esp. 72.; and see *Irving v. Motly*, 7 Bing. 408. An admission by a servant, in a transaction not relating to the business in which he is employed, is not evidence against his master. Thus, a pawnbroker's shopman was heard to state that his master had given 3000. at five per cent. on the security of certain plate, this was held inadmissible as against the master. *Garth v. Howard*, 8 Bing. 451. But if the statement had been made by him in reference to a transaction different. *Id.* 453. *Schumack v. Lock*, 10 B. Moo. 39. The letters of an agent to his principal, containing a narrative of the transactions in which he had been employed, are not admissible in evidence against the principal. *Kahl v. Jansen*, 4 Taunt. 565.; *Fairlie v. Hastings*, 10 Ves. 128.; *Betham v. Benson*, 1 Gow. 45. So in an action against a surety, the admissions or declarations of the principal, to whom goods have been sent by the plaintiff at the defendant's request, are not evidence against the defendant either as to the receipt of the goods, or as to other facts respecting them. *Evans v. Beattie*, 5 Esp. 26. *Bacon v. Cherney*, 1 Stark. 192. But a letter from an agent abroad stating the receipt of money, coupled with the answer of the principal directing the disposition of the money, will be evidence of the receipt by the principal. *Coates v. Bainbridge*, 5 Bing. 58. The admissions of an under-sheriff are evidence against the sheriff; *Drake v. Sykes*, 7 T. R. 117.; but not unless they accompany an act done, or tend to charge himself; he being the real party in the cause. *Snowball v. Goodricke*, 4 B. & Ad. 541. And the admissions of a bailiff are evidence against the sheriff, like the statements of any other agent, when they form part of the transaction. *North v. Miles*, 1 Camp. 389. The admissions of a surveyor to a corporation respecting a house belonging to the corporation, are evidence against the latter in an action for an injury to the plaintiff's house by works done on the defendant's premises.

of *St. Thomas's Hospital*, 4 M. & R. 625. (n); and *Don v. Long*, 1 Camp. 25.

the admissions of an agent can be given in evidence, if the agency must be established; and evidence that the agent is not in other instances, in which the principal will be evidence of a general authority. *Neef v. Watkins v. Vince*, 2 Stark. 368. A receipt for debt signed by the plaintiff's attorney's town agent on a writ of *scire facias*, is evidence of payment against the plaintiff without further proof of agency. *Weary v. Alderson*, 2 M. & Rob. 127.

Admissions by partner.] After *prima facie* evidence of partnership, the declaration of one partner is evidence against his co-partners; *Nicholls v. Dowding*, 1 Stark. 81.; though the former is no party to the suit; *Wood v. Braddick*, 1 Taunt. 104.; but see *Rooth v. Jauney*, 7 Price, 198.; and it is evidence, though made after the dissolution of partnership, if made as to a transaction which took place before the dissolution; *Wood v. Braddick*, 1 Taunt. 104.; but not to bind his co-partner as to a transaction which occurred previously to the partnership, unless a joint responsibility be proved as a foundation for the evidence. *Catt v. Howard*, 3 Stark. 3. Admissions made by one of several partners, after the dissolution of the partnership, are admissible to prove payment, after the dissolution, of a debt due to the partnership. *Pritchard v. Dreper*, 1 Russ. & Myl. 191. A declaration by one of several partners, joint plaintiffs, that goods, the subject matter of the suit, were his separate property, is evidence against all the plaintiffs; *Lucas v. De la Cour*, 1 M. & S. 249.; but an admission by a partner, as to a subject, not of co-partnership, but of joint ownership in a vessel, is not binding on his co-partner. *Jaggers v. Binnings*, 1 Stark. 64. Entries in a book, kept by the clerk of an incorporated company, are not evidence against a member suing them on a contract with him, although the act of incorporation directs the clerk to keep such book, and gives liberty of inspection to all members. *Hill v. Manchester Water Works*, 5 B. & Ad. 866. In an action against two partners on a deed purporting to be executed by one defendant "for self and partner," an admission by the other defendant that he had given due authority to execute on his behalf is not evidence to prove the execution by both without producing the authority. *Steiglitz v. Egginton*, Holt, N. P. 141.

Admissions by wife.] In general, the admissions of a wife will not bind the husband. Thus, the wife's receipt for wages earned by her is not evidence against the husband. *Hall v. Hill*, 2 Stra. 1094. But where the wife can be considered the agent of her husband, her admissions may be received as evidence against him. *Emerson v. Blonden*, 1 Esp. 142.; *Anderson v. Sanderson*, 2 Stark. 204., S. C. Holt, 591. Thus, in an action for goods sold and delivered at the defendant's shop, an offer made by his wife to settle the demand is admissible in evidence, she being accustomed to serve in the shop, and to transact the business in her husband's absence; *Clifford v. Burton*, 1 Bing. 199.; and her admission under such circumstances will take a case out of the Statute of Limitations. *Palethorp v. Furnish*, 2 Esp. 511. (n). Pratt C. J. admitted the wife's declaration, that she agreed to pay four shillings per week for nursing a child, to charge the husband;

it being a matter usually transacted by women. *Anon.* 1 *Stra.* 527. In an action against defendant, as administrator of his wife, for money lent to her before marriage, admissions of the debt made by her during coverture are evidence. *Per* Lord Tenterden C. J., *Humphreys v. Boyce*, 1 *M. & Rob.* 140. But in an action by husband and wife for a loan by the wife *dum sola*, her admissions after coverture were refused as against the plaintiffs, by Lord Kenyon. *Kelly v. Small*, 2 *Esp.* 716. So where plaintiff sues with his wife as executrix, her declarations are inadmissible. *Alban v. Pritchett*, 6 *T. R.* 680. In an action against the husband, the admission of the wife is not evidence of a trespass. *Per Curiam* in *Denn v. White*, 7 *T. R.* 112. A joint answer in Chancery by husband and wife is evidence against the husband, but not the wife; *Elston v. Wood*, 2 *Myl. & K.* 678.; unless, perhaps, she survives her husband. *Wrottesley v. Bendish*, 3 *P. Will.* 238. Where the conduct of the wife is in question, her declarations have been held admissible for her husband in an action against him. Thus, in an action for necessities supplied to the wife, the defence being that the husband had turned her out of doors for adultery, her declarations as to the adultery, made previously to her expulsion, were admitted by Abbott C. J. *Walton v. Green*, 1 *C. & P.* 621. And in an action for seduction, declarations of defendant's wife, tending to show that she aided and colluded with the defendant in seducing the plaintiff's daughter, are evidence in aggravation. *Per* Gurney B., *Knowles v. Compigne*, *Winton Sum. Ass.* 1835.

[*Admissions by counsel or attorney.*] When the counsel in a cause so conducts it as to lead to an inference that a certain fact is admitted by him, the jury may take it as proved. *Stracy v. Blake*, 1 *M. & W.* 168. So, where a fact is assumed at *Nisi Prius* for the purpose of supporting one issue, it must be taken as admitted for the purpose of disproving another issue. *Semble*, *Bolton v. Sherman*, 2 *M. & W.* 403. And if counsel for the plaintiff opens a fact from which his client's possession of a document may be presumed (as payment of a check), though he offers no proof of it, yet defendant may give secondary evidence of it after notice to produce, without further proof of the plaintiff's possession. *Duncombe v. Daniell*, 8 *C. & P.* 222. Where, after a verdict subject to a special case a new trial has been directed, the special case, signed by counsel on both sides, is evidence of the facts there stated. *Van Wart v. Wolley*, *R. & M.* 4.

An admission made by an attorney of one of the parties to prevent the necessity of proving a fact on the trial, is sufficient evidence of that fact; *Young v. Wright*, 1 *Camp.* 141.; as, where he admits the handwriting of the attesting witness, it is sufficient proof of the execution of a deed; *Milward v. Temple*, 1 *Camp.* 375.; and see *Truslove v. Burton*, 9 *B. Moore*, 64. But statements made by the attorney in the course of conversation are not admissible against his client. *Young v. Wright*, 1 *Camp.* 140.; *Parkins v. Hawkshaw*, 2 *Stark.* 239. Admissions made by the defendant's attorney when making proposals on behalf of his client respecting the plaintiff's demand (the attorney refusing to be examined), are evidence against the defendant; and proof that they were made by the attorney on the record will be sufficient to establish his agency. *Gainsford v. Grammar*, 2 *Camp.* 9. But an admission made in a letter written by an attorney (who is afterwards the

attorney in the cause), before the commencement of the action, is not evidence against the defendant without some proof of his having authorized the communication. *Wagstaff v. Wilson*, 4 B. & Ad. 339. An undertaking to appear "for Messrs. T. and M., joint owners of the sloop A.," given by the attorney on the record, is evidence of the joint-ownership. *Marshall v. Cliff*, 4 Camp. 133. An agreement by the attorney "to admit on the trial of this cause the execution of," &c. may be used on a new trial; *Elton v. Larkins*, 1 M. & Rob. 196.; even though the defendant's attorney retracts it before the new trial. *Doe v. Bird*, 7 C. & P. 6.

By the rule of court, H. T. 4 W. 4., a judge at chambers has power, with consent, to order the admission of documents upon due notice in the form pointed out by the rule. The order is made with a "saving of all just exceptions to the admissibility of the documents as evidence." A variation in the description of the instrument, if not of a nature to mislead, will not release the party from the obligation to admit it; as where the date of a bill, annexed to the order, is misdescribed. *Field v. Fleming*, 5 Dowl. P. C. 450. And where the order was to admit "the counterpart of a lease," and the instrument produced, and referred to in the order, was, in fact, an original lease stamped as a counterpart; held, that the party was bound to admit the lease, and could not object to the stamp. *Doe v. Smith*, 8 A. & E. 255.

If a party refuses, at the trial, to make the necessary admission agreeably to the order, and thereby obtains a verdict or nonsuits the plaintiff, the court will grant a new trial at the expense of the party who so refused; and will make his attorney pay the costs, unless he can clear himself from blame. *Doe d. Tindal v. Roe*, 5 Dowl. P. C. 420.

Admissions by payment of money into court.] The practice of paying money into court is now altered by the rule H. T., 4 W. 4. (17.), which directs that such payment shall in all cases be pleaded; and gives the form of plea. The object of this rule is that the admission of the plaintiff's right of action, and the extent of that admission, may appear on the record; in other respects it leaves the effect of the payment into court the same as before, and the former authorities are applicable. Payment of money into court admits everything which the plaintiff must have proved to recover it. *Per Cur. in Dyer v. Ashton*, 1 B. & C. 4. It is an admission that the plaintiff has a legal demand to the extent of the money brought in. *Blackburn v. Scholes*, 2 Camp. 341.; but not beyond that extent. Therefore payment of money into court in an action on a promissory note, payable by instalments, is only an admission that money to the amount paid in was due on it, and does not bar the Statute of Limitations as to a further sum claimed on the same note. *Reid v. Dickons*, 5 B. & Ad. 499. So payment into court upon a count on a valued policy, in which the loss is averred to be total, is no admission of a total loss. *Rucker v. Palgrave*, 1 Camp. 557., S. C. 1 Taunt. 419. Where there is a special contract on the record, the payment into court admits it; but where, as in *indebitatus assumpsit*, the demand is made up of several distinct items, the payment admits no more than that the sum paid in is due. *Meagher v. Smith*, 4 B. & Ad. 678. *Seaton v. Benedict*, 5 Bing. 32. It is a conclusive admission of the character in which the plaintiff sues;

Lipscombe v. Holmes, 2 Camp. 441.; and in which the defendant is sued. *Lucy v. Walbrond*, 3 New Ca. 841.

The effect of payment into court on the general counts has been settled by recent cases which have overruled *Walker v. Rawson*, 1 M. & Rob. 250., and *Ravenscroft v. Wise*, 1 C. M. & R. 203. It is now held only to admit the liability of the defendant, to the extent of the money paid, upon some one or more of the contracts included in the declaration; and "the plaintiff cannot apply it to any particular contract he may please to select." Thus, on a plea of payment into court as to 12*l.*, parcel, &c. of a count for fixtures bargained and sold, upon which plaintiff replies damages ultra, and *non assumpsit* as to the residue, the defendant may insist at the trial that there was no sale of fixtures at all, and is entitled to a verdict though the value of the fixtures alleged to be sold exceeds the sum paid into court. *Kingham v. Robins*, 5 M. & W. 94. The defendant, by his plea, says, in substance, "Can you, under this count, prove any contract against me? If you cannot, I have done an unnecessary act in paying this money into court, which is more than is sufficient to cover the nominal damages to which you are entitled." *Per Alderson B. ibid.* And see *Drake v. Lewin*, 4 Tyr. 730. Where two defendants paid money into court on such counts, it was held that plaintiff was bound to prove a joint liability on some contract beyond the amount paid. *Stapleton v. Nowell*, 6 M. & W. 9. Accord. *Archer v. English*, 1 M. & G. 873. So where plaintiff sued for work done as attorney, and defendant pleaded payment of 52*l.* into court and no damages ultra, on which issue was taken; held, that defendant might dispute any retainer as to the residue. *Seavenson v. Corporation of Berwick*, 1 A. & E. N.S. 154.

Payment into court is an admission of the plaintiff's right to sue in the court in which the action is brought. *Miller v. Williams*, 5 Esp. 19. In an action for wrongfully discharging a servant, the defendant cannot, under a plea of payment into court, show misconduct in mitigation. *Speck v. Phillips*, 5 M. & W. 279. In an action on a bill of exchange, the plea admits the handwriting of the parties; *Gutteridge v. Smith*, 2 H. Bl. 374.; and the sufficiency of the stamp. *Israel v. Benjamin*, 3 Camp. 40. In an action on a guarantee, the payment of money into court, on a plea of tender, admits an agreement signed according to the Statute of Frauds. *Middleton v. Brewer, Peake*, 15. In an action of covenant, it admits the execution of the deed; *Randall v. Lynch*, 2 Camp. 356, 357.; and where two breaches are assigned in one count, payment into court on one of the breaches is an admission of the whole contract as set out in that count, so as to enable the plaintiff to recover on the second breach without proof of the contract. *Dyer v. Ashton*, 1 B. & C. 3. And, if paid in generally, it admits some damage on all the breaches. *Wright v. Goddard*, 8 A. & E. 144. When the declaration avers performance of a condition precedent, payment into court admits it; and where the action lies only on a certain contingency, which has not happened, it waives the objection; *Harrison v. Douglas*, 3 A. & E. 396.; *Leggett v. Cooper*, 2 Stark. 103.; but *quære* of this, unless the special contract be declared upon? Where the declaration states a contract to pay a particular sum of money for certain articles, payment of part of the money into court, by admitting the contract, admits also the sum originally due; and the

only question is as to the remainder. *Cor v. Brain*, 3 Taunt. 25, *Stoveld v. Brewin*, 2 B. & A. 118. But where the declaration is for goods sold, to be paid for at the average price to be ascertained on a day specified, payment into court does not admit the average price to be as stated in the declaration, but only that the average has been struck. *Stoveld v. Brewin*, *ibid.* See also *Everth v. Bell*, 7 Taunt. 450. And where the defendant declared specially upon a promise in writing to pay "his proportion" (without specifying it) of a debt barred by the Statute of Limitations, and averred the amount of the proportion under a *vide-licet*, it was held that payment into court on that count did not admit the amount of the proportion. *Lechmere v. Fletcher*, 1 C. & M. 623. In an action against a carrier for not carrying goods safely, if the defendant has restricted his liability by a notice that he will not be accountable for more than 5*l.*, unless entered and paid for accordingly, the payment of 5*l.* into court does not admit a liability beyond that sum. *Clarke v. Gray*, 6 East, 570.; *Yate v. Willan*, 2 East, 128. Before the New Rules, where the defendant pleaded the general issue and the Statute of Limitations to *indebitatus assumpsit* on goods sold, and paid money into court generally, such payment was held not to take the case out of the statute. *Long v. Greville*, 3 B. & C. 10. Acc. *Reid v. Dickons*, 5 B. & Ad. 499. If the plaintiff declares on an illegal contract, the defendant cannot give it validity by his admission; and if in *indebitatus assumpsit* money is paid into court generally, and the plaintiff insists on several claims some legal and others illegal, the court will apply the payment to the legal claim. *Ribbans v. Crickett*, 1 B. & P. 264. This case, however, was before the late rules of pleading, which require illegality to be pleaded.

If the defendant pays money into court on an instrument bearing interest, and pays the interest only up to the commencement of the action, the plaintiff may proceed for the interest up to the time of payment into court. *Kidd v. Walker*, 2 B. & Ad. 705.

Where there are several counts, and the defendant pays money into court on one of them which is applicable to the plaintiff's cause of action, the plaintiff cannot get his costs by taking a verdict on one of the other counts, unless he can show a right to recover upon both in respect of distinct causes. *Early v. Bowman*, 1 B. & Ad. 689. *Churchill v. Day*, 3 M. & R. 71.

The rule of T. T. 1 W. 4., (2 B. & Ad. 788.), as to annexing the particulars of the plaintiff's demand to the declaration, has not altered the effect of the payment of money into court, so as to make it operate as an admission of them. *Booth v. Howard*, 5 Dougl. P. C. 438. *Meager v. Smith*, 4 B. & Ad. 673.

Admissions by recital.] A recital in a deed is evidence against him who executed the deed, or any person claiming under him. *Com. Dig. Evid. (B. 5.)*, and see *Rees v. Lloyd*, Wightw. 123. And such recital operates as an estoppel if properly pleaded and relied upon; but not if the parties in their pleading voluntarily submit the fact recited to a jury. *Bowman v. Taylor*, 2 A. & E. 278. *Bowman v. Rostron*, *Ibid.* 295. See *anté*, "Receipts," p. 39. Thus the recital of a lease in a release is evidence of the lease against the releasor, and those claiming under him. *Ford v. Grey*, 1 Salk. 286. *Crease v. Barrett*, 1 C. M. & E. 319. So in trespass against a sheriff, a bill of sale reciting the writ,

the taking, and the sale of the goods, is evidence against him of those facts. *Woodward v. Larking*, 3 *Esp.* 286. So the recital of an ancient charter in a modern charter, is evidence. *Per Abbott J., Gervis v. The Grand Western Canal Company*, 5 *M. & S.* 78. The recitals in a deed may confine the effect of admissions in the same instrument. *Lampon v. Corke*, 5 *B. & A.* 607. But the recital in a bond, that the parties had agreed to execute a bond in the sum of 500*l.*, will not confine the bond to that sum, if actually executed in the penal sum of 1000*l.* *Ingleby v. Swift*, 10 *Bing.* 84. A party claiming under a certain title does not necessarily admit statements in previous deeds which make up his title; thus where a deed, reciting the bankruptcy of A., conveys an estate to B.; and B. (being no party to that deed) conveys the estate to another by a deed making no such recital; the above deeds are no evidence of the bankruptcy as against B. in an action concerning other lands. *Doe v. Shelton*, 3 *A. & E.* 265. Where the recital in a deed is used as an admission, it must be proved by the attesting witness; *Breton v. Cope, Peake*, 4*l.*; and a recited instrument is only admitted for so much as is recited: if any other part of it is to be proved, it must be produced and proved in the usual way. *Gillett v. Abbott*, 7 *A. & E.* 783.

Admissions on the record.] Whatever is admitted on the record need not be proved, and cannot be disproved. *B. N. P.* 298. *Evans v. Ogilvie*, 2 *Y. & J.* 79. But an admission in one of several pleas or counts does not operate as an admission as to any other; *Harrington v. Macmorris*, 5 *Taunt.* 228; *Knight v. M'Douall*, 12 *A. & E.* 438.; nor can a notice of set-off, or a particular of it, be used as evidence by the other side. *S. C.* and *Miller v. Johnson*, 2 *Esp.* 602. *Stracy v. Blake*, 1 *M. & W.* 168. But a notice by defendant to produce a certain bill, "accepted by defendant," is evidence of acceptance as against him. *Holt v. Squire, R. & M.* 282. The statements in a plea, held bad on demurrer, are not evidence for plaintiff on another issue, though the *venire* be *tam quam*. *Ingram v. Lawson*, 2 *M. & Rob.* 253. *Montgomery v. Richardson*, 5 *C. & P.* 247. Where a declaration contains two inconsistent special counts, and defendant pays money into court on the second, which plaintiff accepts; the defendant cannot read it, and the proceedings thereon, to the jury in order to negative an allegation in the first on which issue has been taken. *Gould v. Oliver*, 2 *M. & G.* 208. Whatever is pleaded and not denied, shall be taken to be admitted; *Wimbish v. Tailbois, Plowd.* 48.; so that the jury cannot find to the contrary. *Tonkin v. Crocker*, 2 *Lutw.* 1215. Thus if the defendant in replevin avow the taking of cattle damage feasant in the *locus in quo* as parcel of the manor of K. which is his freehold, and the plaintiff make title to the manor of K., and traverse that the manor is the freehold of the defendant, he cannot afterwards prove that K. is no manor, and therefore the *locus in quo* no parcel, for that is admitted by the traverse. *B. N. P.* 298. If the defendant in covenant do not plead *non est factum*, the execution of so much of the deed as is expanded on the record is admitted; but if the plaintiff wish to avail himself of any other part of the deed, he must prove it by the attesting witness in the usual way. *Williams v. Sills*, 2 *Camp.* 519. If the plaintiff traverses a customary right of common in respect of an ancient messuage pleaded by the defendant, he does not thereby admit the antiquity of

the message; for this is involved in the issue. *Dunstan v. Tresider*, 5 T. R. 2.

It seems that a fact admitted on the pleadings is not to be considered on the same footing as if it had been proved to the jury. Thus, if defendant pleads that a note originated in a gaming debt, and that plaintiff took it with knowledge and without consideration, and plaintiff denies any knowledge of the illegality, yet he need not prove the consideration unless the defendant proves the illegality. *Edmunds v. Groves*, 2 M. & W. 642. And *non assumpsit* admits no immaterial allegation in the inducement. *Bennion v. Davison*, 3 M. & W. 179. But in *Bingham v. Stanicy*, T. T. 1841, where the plea stated an original illegal transaction and transfer to the plaintiff without consideration, to which the plaintiff replied a good consideration, on which issue was joined, the court of Q. B. held that such admission on the record put the plaintiff on proof of consideration, and they dissented from the doctrine laid down by the court of Exchequer in the above cases, viz. that facts admitted in the pleadings are not to be taken as if proved to the jury. Since the decision of this case, the court of Exchequer have expressed their adherence to their former opinion. *Smith v. Martin*, 1 Dowd. P. C. N. S. 418. See further on this point, *Blewett v. Tregoning*, 3 A. & E. 554. 579. 583. *Cowlishaw v. Cheslyn*, 1 C. & J. 48.

Even before the late rules (which require a special denial of the plaintiff's character, see *post*, Appendix, No. I.) in an action by an executor or administrator on a cause of action arising in the lifetime of the testator or intestate, a plea of the general issue admitted the title of the plaintiff to sue as executor, or administrator. *Marsfield v. Marsh*, 2 Ld. Raym. 824. *Thynne v. Protheroe*, 2 M. & S. 553. But where the cause of action arose in the time of the executor or administrator, the general issue did not admit his title, and the plaintiff must have proved it. Thus where the plaintiff declared in trover upon a possession by his testator, and a conversion in his own time, pleading the general issue did not admit his title as executor. *Hunt v. Stevens*, 3 Taunt. 113; but see *Watson v. King*, 4 Camp. 272. The plea of the general issue admits only such a title as is stated in the declaration, and therefore where profert is made of letters of administration which are void on the face of them, the plea of the general issue does not admit the title of the plaintiff so far as to enable him to recover. *Adams v. Savage*, 6 Mod. 134. In an action by husband and wife, the plea of the general issue admits the marriage. *B. N. P.* 20. Where, in trespass, the defendant pleads an entry to abate a nuisance, and the plaintiff new assigns unnecessary violence, the nuisance is admitted, and the plaintiff cannot go into evidence to negative it. *Pickering v. Rudd*, 1 Stark. 56.

But it seems that a new assignment does not always admit the truth of the plea; it sometimes amounts only to an assertion that the defendant has mistaken the grievance complained of. *Branoker v. Molyneux*, 1 M. & G. 710. A plea of set-off stated, that the plaintiff made his promissory note payable to A. C., and that A. C.'s administrator indorsed it to the defendant. Replication, that the supposed cause of set-off did not accrue to the defendant within six years. It was held, that the replication admitted the making of the note and the indorsement, and that the defendant might avail himself of a memorandum of the payment of interest written on the note by A. C. (before Lord Tenterden's act), to bar the Statute of Limitations. *Gale v. Copern*,

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When a replication sets several facts in answer to a fact, the replication is immaterial one which is found for the plaintiff, and is so admitted as to entitle the plaintiff to recover. *Gwynne v. Burnell*, 6 New Ca. 453. In the cases of an admission by confession the defendant may traverse another fact. Neither by traversing the facts so as to be admitted in another transaction between the parties, nor by traversing the facts so as to be overruled, the party is still allowed to suppose the facts charged to be true. *St. M. 32*.
Judgment by default is an admission on the record of the defendant. Thus in an action against the acceptor of a bill the defendant, by suffering judgment by default, admits a cause of action to the plaintiff. *Green v. B. & C.* 201. So in an action on a contract, the defendant cannot, by suffering judgment by default, insist upon the fraud of the plaintiff. *Allen v. Glover*, 1 Stra. 612. But where an action is removed by *habere corpus* from an inferior court after judgment by default, that judgment is not evidence against the defendant in the superior court. *Butt v. Firby*, 9 B. & C. 762. And a plea in a discontinued action is not evidence against the defendant in another action. *Allen v. Hartley*, 4 Doug. 20. Demurrer admits facts well pleaded; and, on a writ of inquiry, the amount of the damages is the only question. *De Gaulle v. L'Aigle*, 1 B. & P. 368. *Stephens v. Pell*, 2 Dowl. P. C. 629. When a plea to an *indebitatus* count is pleaded as to a precise sum, that sum, though laid under a *videlicet*, is admitted to be due, and must therefore be covered by that or some other plea to entitle the defendant to a verdict; and for this purpose the plea is divisible and may be found in part for the defendant, and in part for the plaintiff. *Cousins v. Padston*, 2 C. M. & R. 547. So in debt for various items amounting to 37*l.* 16*s.*; plea as to 10*l.* 3*s.* a set-off; as to 8*l.* 3*s.* 6*d.* goods returned; as to the residue, 4*l.* 8*s.* 6*d.* paid into court; in all 22*l.* 15*s.*; defendant proved his plea, except that the set-off fell 2*l.* short of the set-off alleged; held that the plaintiff was entitled to judgment for 2*l.* at all events, although he had narrowed his claim to 20*l.* 5*s.* in his particular. *Green v. Marsh*, 5 Dowl. P. C. 669, per Coleridge, J.

Whole admission to be taken together.] The whole of an admission must be taken together; therefore where an account rendered by the defendant is produced to establish the plaintiff's demand, it is evidence to prove both the debtor and creditor side of the account. *Randle v. Blackburn*, 5 Taunt. 245.; *Thomson v. Austen*, 2 D. & R. 361. But the jury are not bound to believe both sides of the account; therefore where the plaintiff put in evidence an account rendered by the defendant in which he had stated a counter-claim, the plaintiff was permitted to disprove the counter claim and to recover the amount for which defendant owned himself debtor. *Rose v. Savory*, 2 New Ca. 145. Where plaintiff puts in the defendant's answer in chancery to prove an admission, defendant has a right to require the bill to be read. *Pennell v. Meyer*, 2 M. & Rob. 98. The assertion of a party, in a conversation given in evidence against him, of facts in his favour is evidence for him of those facts. *Smith v. Blandy*, R. & M. 257.

though the defendant is entitled to have the whole of a particular book read, he cannot insist upon reading distinct entries of different parts of the book. *Catt v. Howard*, 3 Stark. 6. See also *Rennie v. Hall*, Mann. Index, 376. Where the plaintiff called for the production of defendant's letter-book and read letters of the defendant from it, the defendant was not permitted to read from it, on his own behalf, other letters not referred to in the letters read by the plaintiff. *Sturge v. Buchanan*, 10 A. & E. 598. Plaintiff cannot read the examination of a defendant by commissioners of bankrupt taken on one day, without also reading his examination on another day; *Smith v. Biggs*, 5 Simons, 391.; nor the cross-examination of defendant without his examination in chief. S. C. Where an answer in chancery by a witness is put in only to prove his incompetency, the adverse party cannot read the whole in order to prove the issue. B. N. P. 238.

OBJECT OF EVIDENCE.

The object of evidence is to prove the point in issue between the parties; and, in doing this, there are three general rules to be kept in view. 1. That the evidence be confined to the point in issue: 2. That the substance of the issue only need be proved:— 3. That the burden of proof lies on the party asserting an affirmative fact, if unsupported by any presumption of law.

EVIDENCE CONFINED TO THE ISSUE.

As the object of pleading is to reduce the matters in difference between the parties to distinct and simple issues, so the rules of evidence require that no proofs, oral or documentary, shall be received that are not referrible to those issues. All evidence of matters which the courts judicially notice, or of matters immaterial, superfluous, or irrelevant, is therefore excluded.

[Of what facts the courts will take judicial notice.] There are various facts which the courts will notice judicially; and of which it is, therefore, unnecessary to give any evidence. They will judicially notice the order and course of proceedings in Parliament; *Lake v. King*, 1 Saund. 131.; the privileges of the House of Commons, *Stockdale v. Hansard*, 9 A. & E. 1.; the existence of war with a foreign state, *R. v. De Berenger*, 3 M. & S. 67.; the existence of a foreign state recognised by the British Government; but not otherwise; *Taylor v. Barclay*, 2 Simons, 213.: see *City of Berne v. Bank of England*, 9 Ves. 347. They will notice the superior courts, and their jurisdiction; *Tregany v. Fletcher*, 1 Ld. Raym. 154.; and course of proceeding; *Dobson v. Bell*, 2 Lev. 176.; the privileges of their officers; *Ogle v. Norcliffe*, 2 Ld. Raym. 869.; the beginning and end of term; *Estwick v. Cooke*, 2 Ld. Raym. 1557.; general customs, as those of gavel-kind and borough-English; *Clements v. Scudamore*, 2 Ld. Raym. 1025.; the limits of ecclesiastical jurisdictions; *Adams v. Savage*, 2 Ld. Raym. 854. They will take notice of the different counties and palatinates in England, 2 Inst. 557.; *Deybel's case*, 4 B. & A. 248.; the days of festivals appointed by the calendar; *Brough v. Perkins*, 6 Mod. 81.; the number of days in a particular month; 1 Rol. Abr. 524.; that a particular

day of the month fell on Sunday; *Hanson v. Shackelton*, 4 Dowl. P. C. 48.

The courts will not notice, judicially, the nature and jurisdiction of a local inferior court; *Moravia v. Sloper, Willes*, 37.; nor foreign laws; *Mostyn v. Fabrigas, Cowp.* 174.; nor the Scotch law; *Male v. Roberts*, 3 Esp. 163.; nor the seal or proceedings of a foreign court; *Henry v. Adey*, 3 East, 221.; *Ganer v. Lanesborough, Peake*, 17.; nor the laws of the colonies; *Wey v. Yally*, 6 Mod. 194.; nor the king's proclamation, without production of the Gazette; *Van Omeron v. Dowick*, 2 Camp. 44.; nor particular customs, as those of London; *Argyle v. Hunt*, 1 Stra. 187.; unless duly certified by the recorder; *Blacquiere v. Hawkins*, 1 Doug. 378.; nor that a particular town is within a certain diocese; *R. v. Simpson*, 2 Ld. Raym. 1379.; nor the local situation of a town or a street in a county; *Deybel's case*, 4 B. & A. 243.; *Humphreys v. Budd*, 9 Dowl. P. C. 1000.; nor that a particular town (as Dublin) is in Ireland; *Kearney v. King*, 2 B. & A. 303. Though the courts will take judicial notice of the articles of war which are printed by the King's printer; *Bradley v. Arthur*, 4 B. & C. 304., *R. v. Withers*, cited 5 T. R. 446.; yet the book called "Rules and Regulations for the Government of the Army," will not be judicially noticed; *Bradley v. Arthur, supra*; nor will they notice the rules of the Poor Law Commissioners made under stat. 4 & 5 W. 4. c. 76. s. 15. *R. v. Dolgelly Union*, 8 A. & E. 561.

Surplusage.] Where an averment may be wholly rejected as surplusage, it need not be proved. The rule with regard to the proof of averments is, that if the whole of an averment may be struck out without injuring the plaintiff's right of action, it is not necessary to prove it; but it is otherwise, if the whole cannot be struck out without getting rid of a part essential to the cause of action. *Per* Lawrence J., *Williamson v. Allison*, 2 East, 452. Thus where the plaintiff, in an action on a warranty of goods, alleged that the defendants *knew* the goods to be unfit for sale, it was held that the allegation of knowledge, being immaterial, need not be proved. *Ibid.* So in an action against a person for not obeying a subpoena, the allegation, that the subpoena *was shown* to the defendant, may be rejected. *Mullett v. Hunt*, 1 C. & M. 752.

But where the plaintiff, in an action against the sheriff for taking the tenant's goods in execution without leaving a year's rent, stated the terms of the tenancy with more particularity than was necessary, it was held that they must be proved as laid. *Bristow v. Wright*, 2 Doug. 665. See *post*, "Variance." p. 58.

Evidence of collateral facts.] In general, evidence of collateral facts is not admissible. Thus where the question was whether beer supplied by plaintiff to the defendant was good, the plaintiff was not allowed to bring evidence of the quality of beer supplied by him to other persons. *Holcombe v. Hewson*, 2 Camp. 391. In an action by indorsee against the acceptor of a bill, who defends on the ground of forgery, evidence that the drawer, suspected of the forgery, has forged the defendant's name in other instances, is inadmissible. *Balcetti v. Serani, Peake*, 142.; *Griffiths v. Payne*, 11 A. & E. 131. But where a collateral fact is material to the proof of the issue joined between the parties, evidence of

such fact is admissible. In an action by a rector for tithes, where the question is whether a modus exists of a certain sum of money for a particular farm in a township within the parish, the plaintiff may inquire whether other farms in the same township are not subject to the same payment, for the purpose of showing that such payments cannot be a farm modus. *Blundell v. Howard*, 1 M. & S. 292. On a question of unreasonable delay of the ship on the coast of Labrador, an insurer was permitted by Lord Mansfield to prove the usage of the same trade in the fisheries of Newfoundland. *Noble v. Kennoway*, 2 Doug. 510. But the usage in one particular house, as Lloyd's, is not evidence against an insurer, unless it be shewn he had usually effected insurances there. *Gabay v. Lloyd*, 3 B. & C. 793. In a case of libel, where the meaning is ambiguous, other similar libels on the plaintiff by the same defendant may be shewed against him; see *post*, "Case for Defamation." Upon a question of skill and judgment evidence may be given of facts, which, although in other respects collateral, are, by means of the skill and judgment of the witness, connected with, and tend to elucidate the issue. *Folkes v. Chadd*, 1 Phill. Ev. 276., S. C. 3 Doug. 157. See *post*, "Opinion of Witness." Where the object of the evidence is to shew the knowledge of the party with regard to the nature of a particular transaction, evidence of his having been engaged in other transactions of the same kind is admissible; thus, in the various cases of forgery and coining, proof that the prisoner has passed other forged notes, or other counterfeit coin, is constantly admitted. See *Rosc. Dig. Crim. Evid.* 58. 66. So also upon questions of intent, evidence of other transactions is admissible. *Id.* 71. In an action for bribery, evidence of other acts of bribery by the defendant at the same time and place, are admissible to shew the animus. *Webb v. Smith*, 4 New Cs. 373. The seditious object of a meeting may be shewn by the acts of similar meetings in other places convened by the same person. *Redford v. Birley*, 3 Stark. 93. In order to prove that the acceptor of a bill knew the payee to be a fictitious person, or that the drawer had a general authority from him to fill up bills with the name of a fictitious payee, evidence may be adduced that he had accepted other similar bills under circumstances that indicated such knowledge, or authority. *Gibson v. Hunter*, 2 H. Bl. 288.

Evidence of rights in other manors and places.] As a general rule, proof of a customary right in a particular manor or parish, is no evidence as to the customary right in an adjoining manor or parish. *Duke of Somerset v. France*, 1 Stra. 661. But there are occasions on which such evidence is relevant. Thus, where all the manors in a particular district are held under the same tenure, and a question arises in one of the manors as to an incident to the tenure, evidence may be given of the usage prevailing in any other of the manors within the district. *Ibid.* *Champion v. Atkinson*, 3 Keb. 90. *R. v. Ellis*, 1 M. & S. 662. So where, in each of several detached manors called by the common name of "assessionable manors," and parcel of the possessions of an ancient earldom and duchy, it appeared that there was a peculiar class of tenants answering the same description, and to whom tenements were granted by similar words, it was held that evidence of the mineral and other rights enjoyed by those tenants in one manor, might be received to shew what were their rights in another. (Case of the Duchy of

Cornwall.) *Rowe v. Brenton*, 8 B. & C. 758. And where the question was, whether a slip of land, between some old inclosures and the highway, was vested in the lord of the manor or the owner of the adjoining freehold, it was held that evidence might be received of acts of ownership by the lord of the manor on similar slips of land, not adjoining his own freehold, in various parts of the manor. *Doe v. Kemp*, 2 New Ca. 102. Where the question was as to the right to certain trees growing in a woody belt of considerable extent held entire and undivided under one title, evidence was admitted of acts of ownership in different parts of the belt. *Stanley v. White*, 14 East, 332. So where the plaintiff claims the whole bed of a river between his land and the defendant's, acts of ownership over the river just below the defendant's land are admissible; for the evidence need not be confined to the precise spot of the trespass. *Jones v. Williams*, 2 M. & W. 326. So acts of ownership in part of a wood though unenclosed, or in part of a continuous fence, are evidence as to the whole. *Ibid.* 331. But in trespass by the proprietors of a canal, it was doubted whether evidence of acts of ownership by the proprietors on other parts of the banks than those in question, was admissible to prove property, without showing that they had belonged to one person; for a canal usually passes through various properties; and the proprietors may have bought the freehold in one place and not in another; and, being unnecessary, there was no ground for presuming a purchase in any place. *Hollis v. Goldfinch*, 1 B. & C. 205. And see *Tyrwhitt v. Wynne*, 2 B. & A. 554. In proof of the boundary between the manors A. and B., evidence is admissible of the boundary between A. and C., C. being a manor abutting on B., and separated from A. by a natural boundary which continued between A. and B. *Brisco v. Lomas*, 8 A. & E. 198. Under a lease of all minerals under a tract of waste land called M. mountain, working a mine under one part of the surface of it, is evidence of possession of the whole subject of demise, so as to entitle the lessee to sue in trover for ore taken by a wrong-doer from another part of it. *Taylor v. Parry*, 1 M. & G. 604.

Evidence of damage.] Evidence tending to increase or diminish the damage are, of course, admissible, though not expressly involved in the issue. Thus, in an action of breach of promise of marriage, plaintiff may give evidence of the defendant's fortune; for it obviously tends to prove the loss sustained by the plaintiff; but not in an action for adultery; *James v. Biddington*, 6 C. & P. 589.; or for malicious prosecution; for "it is nothing to the purpose that damages are taken from a deep pocket." *Per Alderson B. in Short v. Stoy*, *Winton Sum. Ass.* 1836.

But special damage cannot be shown unless stated in the declaration; and it must be stated with certainty. Thus where, in an action for an irregular distress, it was averred that the plaintiff, in consequence of the injury, had lost *divers* lodgers, without naming any, Lord Ellenborough rejected evidence of the damage. *Westwood v. Cowne*, 1 Stark. 172. See further *Craft v. Boile*, 1 Saund. 243. b. note (5). Where it was alleged as special damage that the plaintiff lost her marriage with J. N., Holt C. J. refused to let evidence be given of a loss of marriage with any other person. *Martin v. Henrickson*, 2 Ld. Raym. 1007.; and see *post*, "Case for Defamation." Where a declaration for false im-

prisonment alleged, as damage, that the plaintiff had been obliged to pay, and *had paid* C. his attorney, a certain bill of costs ; and, in fact, he had not paid the bill ; it was held that he could only recover such part of the bill as C. had paid, and which might be considered as paid by the plaintiff himself. He should have stated that he had become *liable to pay*. *Pritchett v. Boovey*, 1 C. & M. 775., S. C. 3 Tyr. 949. But a damage which is the *necessary* result of the defendant's breach of contract may be proved, although not specially alleged in the declaration. Thus, in *assumpsit* for not giving plaintiff possession of premises demised by the defendant, plaintiff may shew his consequent loss of business, though only alleged generally, and though the plaintiff's business is not mentioned in the pleadings. *Ward v. Smith*, 11 Price, 19.

Evidence of character.] In general, in actions unconnected with character, evidence as to the character of either of the parties to a suit is inadmissible, being foreign to the point in issue, and only calculated to create prejudice.

But evidence of the party's bad character is admitted in some actions with a view to the amount of damages. Thus, in actions of crim. con., evidence is admissible of the wife's bad character for chastity, and even of particular acts of adultery committed by her before her intercourse with the defendant ; for, by bringing the action, the husband puts her general behaviour in issue. *B. N. P.* 27. 296. ; see *post*, "*Trespass for Crim. Con.*" So, in seduction, the defendant may show the previous bad character of the person seduced. See *post*, "*Trespass for Seduction.*" But even in cases in which character is material, it has been held that the plaintiff, in an action for crim. con. or seduction, cannot give evidence of the good character of the wife or daughter, until evidence has been offered on the other side to impeach it ; *Bamfield v. Massey*, 1 Camp. 460. ; and if such evidence be not general, but go only to a specific instance, it has been ruled that the plaintiff cannot, in reply, give evidence of general character, but must be restricted to disproof of the specific instance. *Ibid.* ; but see 2 *Phill. Ev.* 205. ; 2 *Stark. Ev.* 371. So in an action for slander imputing dishonesty to the plaintiff, he cannot adduce evidence, in the first instance, of good character. *Cornwall v. Richardson*, R. & M. 305. Where the cross-examination of the plaintiff's witnesses has been directed to impeach the character of the plaintiff, and the witnesses deny the imputation intended, proof of the plaintiff's good character is not admissible. *King v. Francis*, 3 *Esp.* 116. ; see *Bate v. Hill*, 1 C. & P. 100. As to proof of character in actions for defamation, see *post*, "*Case for Defamation.*"

Plaintiff confined to his particulars of demand.] Where the plaintiff has delivered a particular of his demand, he will be precluded from giving any evidence of demands not contained in it. Thus, where the particular states a demand for horses sold by the plaintiff to the defendant, evidence cannot be given of money due from the defendant for horses sold by him as the plaintiff's agent. *Holland v. Hopkins*, 2 B. & P. 243. In an action for damaging some goods and for not re-delivering others, the particular contained articles under each head, and mentioned one as "not re-delivered," which was in fact re-delivered

vered but damaged; held that plaintiff could not recover in respect of it. *Moss v. Smith*, 1 M. & G. 228. Proof that the defendant acknowledged that he owed the plaintiff 13l. 10s. will not support particulars "To a beast sold and delivered, 13l. 10s." *Breckon v. Smith*, 1 A. & E. 499. Where the particulars contained a demand on a promissory note only which could not be given in evidence for want of a stamp, it was held that the plaintiff could not give evidence of the consideration of the note. *Wade v. Beasley*, 4 Esp. 7. But in an action by a carrier who had misdelivered certain goods to the defendant, which the latter appropriated to his own use, the carrier having paid the amount of the goods to the real owner, it was held that he might recover on the count for money paid, although his particulars were only "To seventeen firkins of butter, 55l. 6s." *Brown v. Hodgson*, 4 Taunt. 189. Where a particular need not be given as to some counts, the omission of those causes of action will not be material. Thus, where there were counts on two bills of exchange and for goods sold, and the particulars specified only one of the bills and the goods, it was held that plaintiff might nevertheless recover on both the bills, because the particular, as to those, was superfluous. *Per Abbott*, C. J. *Cooper v. Amos*, 2 C. & P. 267. *Day v. Davies*, 5 C. & P. 340. The plaintiff may recover interest on a note, though the particular contains only a demand upon the note itself. *Blake v. Lawrence*, 4 Esp. 147. It has been ruled that the plaintiff may recover more than his particulars demand, where it appears to be due on the defendant's own evidence; as where the defendant gave in evidence an account, from which it appeared that there was a sum of money due to the plaintiff beyond that claimed in his particulars. *Hurst v. Watkins*, 1 Camp. 68. Accord. *per Parke B.*, in *Fisher v. Wainwright*, 1 M. & W. 486.

A mistake in the particulars, not tending to mislead, is immaterial. Thus, a variance in the date of an instrument, or of any other transaction specified in it, is immaterial, if the circumstances show that the opposite party must have known what was meant. *Dunn v. Thomas*, *Manning's Index*, 240. *Flemming v. Crisp*, 5 Dowl. P. C. 454. So where the particulars specify a payment made on account of the defendant to A., which was in fact made to B., it is sufficient, unless the defendant will show that he has been misled. *Day v. Bower*, 1 Camp. 69. (n.) So where the action is for money had and received to the use of the bankrupt, and the particulars are for money had and received to the use of the plaintiffs as assignees. *Tucker v. Barrow*, M. & M. 137. So where work and labour are stated to have been performed in a certain month, which was in fact performed in another month. *Millwood v. Walter*, 2 Taunt. 224. So again, where in debt for rent, premises situate at A. are described as at B., it is immaterial, unless it appears that defendant held other premises of the plaintiff at B. *Davies v. Edwards*, 3 M. & S. 380. Disbursements have been held to be recoverable under particulars "for cash advanced;" *Harrison v. Wood*, 8 Bing. 371.; and particulars in which the plaintiffs claim for goods sold as *brewers*, will not prevent their recovering as *spirit dealers*, where the defendant has not been misled. *Lambirth v. Roff*, 8 Bing. 411. If plaintiff declares for use and occupation, and delivers a particular stating a special contract of demise which he fails in proving, yet he may recover on a *quantum meruit*, there being no question on the identity of the tenancy. *Kirkman v. Jervis*, 7 Dowl. P. C. 678. The mate-

ality of the variance is a question for the judge, subject, of course, to the opinion of the court above.

In an action for lottery tickets sold, the particulars of the defendant's set-off, mentioning the sale of the tickets to himself, were held not to be sufficient proof of the sale; the fact must be proved by other evidence. *Miller v. Johnson*, 2 Esp. 602. *Larington v. Macmorris*, 5 Taunt. 229. Yet in a late case the particulars of the plaintiff's demand, duly proved by defendant, were allowed to be evidence for the defendant to prove payments for which the plaintiff had given the defendant credit. *Rymer v. Cook*, M. & M. 86. (n.). And see *Kenyon v. Wake*, 2 M. & W. 764. accord.

If the plaintiff, perceiving a defect in his particular, delivers a second particular large enough to comprehend his whole demand, yet this will not avail him, unless delivered under a judge's order; but he will be confined to his first particular. *Brown v. Watts*, 1 Taunt. 353.

The particulars were formerly proved by the production of the judge's order; of the particulars themselves; and by proof of the signature of the party, his attorney, or agent. 1 *Phill. Ev.* 183. But since the rule T. 1 W. 4. (6.), which directs that a copy of the particulars of demand and of the defendant's set-off, shall be annexed by the attorney to the record at the time it is entered with the judge's marshal, it is no longer necessary to prove the delivery of them. *Macarthy v. Smith*, 8 Bing. 145. But the particulars are not thereby made part of the record and incorporated with the pleading to which they are annexed. *Booth v. Howard*, 5 Dowd. P. C. 438. *Ferguson v. Mahon*, 9 A. & E. 245.

THE SUBSTANCE OF THE ISSUE ONLY NEED BE PROVED.

The substance of the issue joined between the parties need alone be proved. Thus, on a count against a sheriff for a voluntary escape, the plaintiff may prove a negligent one. *Bonafous v. Walker*, 2 T. R. 126. So, on a count on a policy averring a total loss, he may prove a partial loss. *Gardiner v. Croasdale*, 2 Burr. 904. If a plea in trespass alleges two matters, either of which amounts to a justification, proof of one of them is sufficient, though they may both be put in issue by the replication. *Spilsbury v. Micklethwaite*, 1 Taunt. 146. It is enough if so much of a divisible plea of justification be proved, as is sufficient to cover as much as the plaintiff proves of his declaration; *Redford v. Birley*, 3 Stark. 83.; (i. e. provided the rest of the declaration be covered by the general issue.) So if, to an action of assault, defendant pleads arrest for felony, and a battery by reason of resistance, it is needless to prove the resistance, if the plaintiff has not declared for the battery. *Atkinson v. Warne*, 1 C. M. & R. 827. Where defendant pleaded that plaintiff received a bill on an unlawful time bargain, the difference to be paid when the price of stock was below a certain price, to wit, &c., it was held that the price was immaterial. *Robson v. Fallois*, 3 New Ca. 392. In an action on a bond the condition of which is that the obligor shall not cut down any trees, if the plaintiff assigns for breach that the obligor cut down twenty trees, he may prove that part of that number only were cut down. *Co. Litt.* 282. a. In slander, the plaintiff is entitled to a verdict *pro tanto* on proof of some of the actionable words laid. *Compagnon v. Martin*, 2 W. Bl. 790. In re-

plevin, the defendant, who avows for rent arrear, is entitled to a verdict, though he prove less to be in arrear than he has alleged, as one quarter instead of two. *Harrison v. Barnby*, 5 T. R. 248. When an averment in a declaration is divisible, it is sufficient to prove part of it, if such part will support the action. Thus where, in a declaration for a false return of *nulla bona* to a *fi. fu.* against the goods of A. and B., it was alleged that A. and B had goods within the bailiwick, it was held sufficient to prove that either A. or B had goods. *Jones v. Clayton*, 4 M. & S. 349. With regard to the use of a *scilicet* or *videlicet* in pleading, it commonly precedes a more precise statement of that which has been already alleged generally. Wherever the rules of pleading require certainty (*i. e.* particularity) in the statement, the rule is sufficiently complied with by introducing the particulars, *e. g.* time, sum, number, place, &c. after a *scilicet*. In such cases it is unnecessary to prove the statement exactly as laid, unless it be matter of description. But whenever the fact stated, or the precise time, sum, &c. alleged, is material, the use of a *scilicet* will not relieve the party from the necessity of an exact proof. Where the *scilicet* is omitted, there are authorities for holding the party to strict proof even in cases where such precision is wholly beside the merits. See further on the use of a *scilicet*, *Dakin's case*. 2 Willms. Saund. 290. a. n. (1); *Cooper v. Blick*, Q. B., H. T. 1842. MSS. A. & E. N. S.: but the enlarged powers of amendment given to judges at Nisi Prius, make the question one of less importance.

Variance.] The doctrine of *variances* is connected with this head of evidence. It is a general rule that a party must recover *secundum allegata et probata*, and cannot succeed upon a proof that differs from his allegation. We have seen that if a matter alleged is in its nature entire, the whole must be proved; if it be divisible, then only so much as will leave the plaintiff a ground of action, or the defendant a sufficient defence. Contracts, prescriptions, records, instruments, &c. stated in pleading are entire, and must, therefore, be entirely and substantially proved as laid; whereas torts and other similar acts, are divisible, and may be proved in part only. See *Bristow v. Wright*, 2 Doug. 665.; *Guinnet v. Phillips*, 3 T. R. 643.; *Ricketts v. Salwey*, 2 B. & A. 363. 366. In matters immaterial, impertinent, or merely formal, a variation between the pleading and evidence is unimportant.

Although considerable powers of amendment at the trial have been conferred on the courts by late acts of parliament, yet the law in respect to *variances* remains the same.

Variance in contract — in the parties.] It is a fatal variance if it appear in evidence that a party, who ought to be joined as *plaintiff*, has been omitted; *Graham v. Robertson*, 2 T. R. 282.; but it is no variance to omit a person who must be joined as *defendant*; the non-joinder must be pleaded in abatement. 1 Saund. 291. d. n. (4) to *Cabell v. Vaughan*. Where a contract has been made with two persons, one of whom is since dead, and the action is brought upon such contract by the survivor without stating the fact of his being survivor, it is a fatal variance; *Jell v. Douglas*, 4 B. & A. 374.; but it is otherwise with regard to the party against whom an action is brought, who need not be stated to be survivor; for the joint debt may, by

reason of the death of the party, be treated as if it had been originally a separate debt. *Richards v. Heather*, 1 B. & A. 29. Where a contract is made by one of several partners (the partnership being really interested), it is no variance that the action is brought in the names of all the partners. *Garrett v. Handley*, 4 B. & C. 664. Thus, where an application is made to a banker, a member of a firm, for a loan; and the advance is made out of the money of the firm in which the partners are jointly interested; the action may be brought by all the members of the firm. *Alexander v. Barker*, 2 C. & J. 133. But it is otherwise where the customer sues: Thus, where the joint owners of a vessel permitted one of their body to keep a separate account with the defendants (bankers) in his own name, as managing owner, it was held that the other joint owners could not sue for money had and received, on the ground of want of privity; *Sims v. Brittain*, 4 B. & Ad. 375.; and *per Parke J.*, the case is the same as if the defendants had been the bankers of the single owner. *Id.* 377. And so where the joint owner kept only a separate account with the banker, to the credit of which he paid in money belonging to the other joint owners. *Sims v. Bond*, 5 B. & Ad. 389. But where a married woman illegally deposited the monies of her husband with a banker in the name of a child under age, it was held that the husband might sue the bankers for money had and received. *Calland v. Loyd*, 6 M. & W. 26. Where three persons agreed to be jointly interested in certain goods, but that they should be bought by one of them in his own name only, and he made the contract accordingly; it was held that all the three might sue for a breach of that contract; *Cothay v. Fennell*, 10 B. & C. 671.; for the action may be maintained either in the name of the person who actually made the contract, or in the name of the parties really interested. *Skinner v. Stocks*, 4 B. & A. 437. And where an attorney carried on business under the firm of "A. and Son," the son not being in fact a partner but acting as a clerk to his father and receiving a salary, it was held that A. might maintain an action, in his own name, to recover from a client the amount of a bill for business done. *Kell v. Nainby*, 10 B. & C. 20. An agent who purchases for an unnamed principal (the bought and sold notes being made out in the agent's name) may, on the renunciation of the contract by his principal, sue for the non-delivery of the goods in his own name. *Short v. Spackman*, 2 B. & Ad. 962. It is a fatal variance to describe a bond conditioned for payment by A., B., and C., as a bond for payment by A., B., and D., though the bond be several as well as joint, and the action be against A. severally. *Adams v. Bateson*, 6 Bing. 110. Plaintiff may join, as co-defendant, a dormant partner not known to him at the time of the contract, even where there was a written agreement (not under seal) to which such partner was not party; but if the agreement was with A. and B. and the survivor of them, it cannot be stated as one between A. and C. (the dormant partner) and the survivor of them. *Beckham v. Knight*, 1 M. & G. 738. *De Mautort v. Saunders*, 1 B. & Ad. 398.

Variance in contract — in consideration.] It is not necessary for the plaintiff to set out all the several parts of a contract consisting of distinct and collateral provisions: it is sufficient to state so much of the contract as contains the entire consideration for the act, and the entire

act to be done in virtue of such consideration, including the time, manner, and other circumstances of its performance. *Clarke v. Gray*, 6 East, 568. *Parker v. Palmer*, 4 B. & A. 387. But the omission of any part of the consideration is a fatal variance. Thus, in assumpsit by a landlord against the assignees of a bankrupt on an agreement to pay ten shillings in the pound for rent due from the bankrupt and themselves, it appeared that part of the consideration, viz. that the plaintiff should accept a surrender, was omitted; the plaintiff was nonsuited. *Dashwood v. Pearl*, *Manning's Index*, 308. So where the contract declared on was, to deliver to the plaintiff tallow at 4s. per stone, and the contract proved was, to deliver it at 4s. per stone, and so much more as the plaintiff paid to any other person, the variance was held fatal. *Churchill v. Wilkins*, 1 T. R. 447. It seems, that if the declaration state the consideration to be certain reasonable reward, evidence that a specific sum was agreed on will not be a variance. *Semb. per Chambre J., Bayley v. Tucker*, 2 N. R. 458.

Variance in the contract — in the promise.] It is only necessary to state so much of the promise, for the breach of which the plaintiff proceeds. *Clarke v. Gray*, 6 East, 568. Thus, where the plaintiff declared that in consideration of his re-delivery to the defendant of an unsound horse, the defendant promised to deliver to him another horse which should be worth 80*l.*, and be a young horse, and a breach was assigned in both those respects, it was held no variance, though it was proved that the defendant also promised that the horse was *sound*, and had never been in harness. *Miles v. Sheward*, 8 East, 7. But the omission of a qualification in the promise will be fatal. Thus, the statement of a general warranty of a horse is not supported by proof of a warranty of soundness, *excepting* a kick on the leg. *Jones v. Cowley*, 4 B. & C. 445. So when the plaintiff's declared that for certain hire and reward the defendants undertook to carry goods from London, and deliver them safely at Dover, and the contract proved was to carry and deliver safely (fire and robbery excepted), the variance was held fatal. *Latham v. Rutley*, 2 B. & C. 20. So a promise in the alternative cannot be stated as an absolute promise. *Penny v. Porter*, 2 East, 2. So a contract to deliver soil cannot be declared upon as a contract to deliver soil, or *breeze*, if it appear that soil and breeze are different articles. *Clark v. Manstone*, 5 Esp. 239. So where the allegation was, that the defendant promised to farm certain land in a husbandlike manner, and the proof was that he promised to farm the land in a husbandlike manner *to be kept constantly in grass*, the variance was held fatal. *Saunderson v. Griffiths*, 5 B. & C. 909. A contract to complete works *within* fourteen days before Michaelmas day, is not proved by a contract to complete them fourteen days before that day. *Thomas v. Lambert*, 3 A. & E. 61. But if the omission does not alter the legal effect of the promise the variance is immaterial. Thus, where the promise was stated to be to deliver a quantity of gum Senegal, but the contract appeared by the evidence to be for the delivery of *rough* gum Senegal, the variance was held immaterial, it appearing that all gum Senegal on its arrival in this country is called *rough*. *Silver v. Heseltine*, 1 Chitty Rep. 39. So where the declaration stated that the defendant had agreed to buy a large quantity of head matter and sperm oil in the possession of the plaintiff, and the contract proved was for the purchase of "all the

head matter and sperm oil, *per the Wildman*," it was held no variance. *Wildman v. Glossop*, 1 B. & A. 9.

Variance in contract — in legal effect.] It is in general sufficient and proper to describe a contract according to its legal effect. *Thornton v. Jones*, 2 Marsh. 287. An agreement to sell oats at so much per bushel must be taken to mean the legal bushel, and will not be supported by evidence to sell by some other bushel. *Hockin v. Cooke*, 4 T. R. 314. So, if a bill of exchange is stated to have been drawn for a certain sum of money, it will be intended to be English money. *Kearney v. King*, 2 B. & A. 301. *Sproule v. Legge*, 1 B. & C. 16. But, upon a common count for money lent, it is no variance if the loan is proved to have been of foreign coin, as pagodas. *Harington v. Macmorris*, 5 Taunt. 228. It has been held, that a statement of a contract to deliver saddles to the plaintiff at a reasonable price, is supported by proof of an agreement to deliver saddles "at 24s. a 26s." *Laing v. Fidgeon*, 6 Taunt. 108. See *Bayley v. Tucker*, 2 N. R. 458., *anté*, p. 60. And where the agreement is silent as to price, the law implies a reasonable one. *Hoadly v. M'Laine*, 10 Bing. 483.; but see *Acebal v. Levy*, 10 Bing. 376 *post*. Where the declaration was for not removing goods in a reasonable time, and the contract proved was to remove in a month, it was ruled by Lord Kenyon to be a fatal variance. *Hore v. Milner, Peake*, 42. And proof of a contract to deliver "at the shipping price," will not support a count for goods sold at a reasonable price. *Acebal v. Levy*, 10 Bing. 376. An averment of a contract to do an act, on request, is not proved by a contract to do it on a certain day. *Bordenave v. Gregory*, 5 East, 111. The allegation of an agreement to take a full cargo of wheat is not supported by evidence of an agreement to take on board 500 quarters of wheat, though that quantity, in fact, amounts to a full cargo. *Harrison v. Wilson*, 2 Esp. 708. But see *Wickes v. Gordon*, 2 B. & A. 335. A special allegation of a retainer "at a certain salary, to wit, 250*l.* per annum," can be supported only by proof of a contract for a specific annual salary. *Preston v. Butcher*, 1 Stark. 3. The statement of a contract for the purchase of a "certain quantity, to wit, eight tons," of goods, is supported by proof of a contract for the purchase of *about* eight tons, the precise quantity being proved to be eight tons. *Gladstone v. Neale*, 13 East, 410. The statement of a contract to deliver stock on the 27th of February, is proved by evidence of a contract to deliver on the settling day, coupled with proof that the settling day was fixed by the parties to mean the 27th of February. *Wickes v. Gordon*, 2 B. & A. 335. An averment that a bill was drawn by certain persons using the style of "Ellis, Needham, and Co." is supported by proof, that the bill was drawn by A. only, under the firm of "Ellis, Needham, and Co." *Bass v. Clive*, 4 M. & S. 13. So a general averment, that a bill was accepted by the defendants, is proved by evidence that it was accepted by their authorized agent for them. *Heye v. Heselline*, 2 Camp. 604. A conveyance to the defendant's nominee supports an averment that the defendant became the purchaser. *Seaman v. Price*, R. & M. 195. A tenancy from year to year may be declared upon as a lease for as many years as the tenancy has, in fact, continued. *R. v. Herstonceaux*, 7 B. & C. 551. A declaration as on a joint bond is supported by proof of a joint and several bond. *Middleton v. Sandford*, 4 Camp. 34. In

an action on a promissory note by A. B., if the plaintiff allege that the note was made payable to him by the name of A. C., and the note appears to have been made payable to A. C., the plaintiff is entitled to recover if it be shown that he was the person really meant. *Willis v. Barrett*, 2 Stark. 29. Where two lots are sold under an Inclosure Act, a special count upon a sale of "divers, to wit, two lots, &c." is bad; the agreements being separate both in law and fact, and not forming one contract. *James v. Shore*, 1 Stark. 428.; and see *Emmerson v. Heelis*, 2 Taunt. 47. Declaration stated a sale of a house for the residue of a term of years, to commence 1st of January next. The agreement produced was, "I agree to sell the house No. 163. to commence on 1st of January next," &c. Held that the agreement imported a sale of the fee simple, and therefore varied from the declaration. *Hughes v. Parker*, 8 M. & W. 244.

Where a deed is verbally set out with a "*testatum existit*," there can be no variance as to the legal effect. *Ross v. Parker*, 1 B. & C. 358.

Variance in prescription, custom, &c.] Where a prescription is alleged in bar, it is an entire thing, and must be proved as laid. *Per Holroyd J.*, *Ricketts v. Salucy*, 2 B. & A. 366. The proof must be of a prescription as ample as that alleged; and, therefore, an alleged prescription for all commonable cattle, is not proved by common for sheep and horses only. *Pring v. Henley*, B. N. P. 59. But such a prescription may be found by the jury upon proof that the claimant has turned on all the commonable cattle he ever kept, though these should happen to be only sheep. *Manifold v. Pennington*, 4 B. & C. 161. So where the defendant prescribed for all cattle, &c., at all times of the year, and it appeared in evidence that sheep were excepted for a certain time in the year, the court held the prescription not proved. *R. v. Hermitage, Carth.* 241. Common of pasture, "paying so much for it," must not be pleaded as unqualified common. *Gray's Case*, 5 Co. 79. A prescriptive right to enter to get minerals is not supported by proof of a right, subject to payment of compensation. *Paddock v. Forrester*, 1 Dowl. P. C. N. S. 527. But the proof of a larger prescription than that alleged will not be a variance. Thus, where the plaintiff, in reply to a plea of distress damage feasant, prescribed for a right of common for 100 sheep, and the jury found a right for 100 sheep and six cows, the prescription was held to be proved. *Bushwood v. Pond*, Cro. Eliz. 722. If the proof had been a right for 150 sheep, the court thought it would have been a variance. *S. C.* And see *Bruges v. Searle*, Carth. 219.; *Bailiffs of Tewkesbury v. Bricknell*, 1 Taunt. 142., 1 Camp. 315. (n). An allegation of a right of ferry from A. to B. is proved by evidence of a ferry from A. to B. and back again. *Pim v. Currell*, 6 M. & W. 234. On a justification by the lord of a manor, that the lord should have the best beast on the tenant's death, the custom proved was that the lord should have the best beast, *or good*, and the variance was held fatal. *Adderley v. Hart*, 1 B. & P. 394. (n). Where a party claimed an easement to dry linen in a certain close in respect of a message; proof of a right for the occupiers to dry the linen of their own families only, was held insufficient. *Drewell v. Towler*, 3 B. & Ad. 735. Where a plea of justification for taking two horses, as heriots, stated an immemorial custom in the manor for the lord, until the division of a certain tenement into moieties, to take a heriot upon the

death of every tenant dying seised, and, since the division, to take, on the death of every tenant dying seised of either of the moieties, a heriot for each moiety; it was held that this must be taken to be one entire custom, and not two distinct customs applicable respectively to the tenement before, and after, the division of it; and that the custom was disproved by evidence that the division was made within memory. *Kingsmill v. Bull*, 9 East, 185.

By the new rules of pleading, II. T. 4 W. 4., all pleas of right of way, common of pasture, and "other similar right," so pleaded as to be capable of being construed distributively, shall be taken distributively. Thus, if the plea states a right of way, with carriages, cattle, and on foot, and the jury find a right with carriages, and on foot; the defendant shall have a verdict for such of the trespasses as are justified by the right found; and the plaintiff for the rest. So if defendant pleads a right of common for divers kinds of cattle, and the jury find a right only for a particular kind, there shall be a verdict for the defendant for such trespasses as are justified by the right found, and for the plaintiff as to the rest. See *post* Appendix, No. I.

Variance in torts.] The omission of a person who ought to be joined as plaintiff in an action *ex delicto*, is only ground of plea in abatement, and is no variance. *Dockway v. Dickenson*, *Skin.* 640. *Bloxam v. Hubbard*, 5 East, 420. And the omission of a person who might have been joined as defendant, cannot in any manner be taken advantage of; *Cabell v. Vaughan*, 1 Saund. 291. *e. n.* (4); unless in the case of one parcener, joint-tenant, or tenant in common of land sued in respect of the land, in which case he may plead the non-joinder of his co-tenant in abatement. *Ibid.* In actions of tort, it is no variance to prove a part only of the causes of action stated. Thus, in a count for slander, where the obnoxious words contain distinct charges, it is sufficient to prove the words conveying any one of those charges, provided the other words do not affect, or modify those which are proved. *Flower v. Pedley*, 2 Esp. 491. Where the plaintiff declares for the disturbance of a right of common, which he has in respect of a messuage and land, he may prove a right of common in respect of the land only, provided he has not averred the land to be appurtenant to the messuage. *Ricketts v. Salvey*, 2 B. & A. 360. But where in an action of tort, matter of contract is alleged, it must be proved as laid. *Bristow v. Wright*, 2 Doug. 664. 'So matter of description must always be proved as alleged; thus, in a declaration for assaulting a constable in the execution of his office, it was alleged that he was constable of a particular parish, but it appeared in evidence that he was sworn in for a liberty of which the parish was part, the variance was held fatal. *Goodes v. Wheatly*, 1 Camp. 231. The facts averred, or a part of them sufficient to constitute a cause of action, must be proved as laid. Therefore evidence that the defendant made a statement of facts amounting to a charge of *tortious conversion*, will not support a count for imputing the crime of felony. *Tempest v. Chambers*, 1 Stark. 67. So evidence of the improper stowing of the defendant's anchor, whereby it broke into another vessel and damaged the plaintiff's goods, will not support a count stating the injury to have been caused by the unskilful steering of the defendant's ship. *Hullman v. Bennett*, 5 Esp. 226. So where the plaintiff alleges as a grievance the remote, and not the proximate, cause

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of the injury inferred, it is a variance; as where the declaration stated, that the defendant wrongfully placed and continued a heap of earth, whereby the refuse water was prevented from flowing away from his house down a ditch; and it appeared in evidence that the heap was not originally placed so as to obstruct the water, but in process of time was trodden down by strangers, and fell into the ditch, and so obstructed it, the variance was held fatal. *Fitzsimons v. Inglis*, 5 Taunt. 534. Where plaintiff declares for the diversion of water by cutting and continuing a sewer on defendant's land, it is enough to prove a diversion by continuing it only; *Dukes v. Gostling*, 1 New Ca. 588. 592.; and where plaintiff sued defendant in tort for so negligently making out the accounts of a partnership, of which the plaintiff was one, and ascertaining the balance due to each, that he was a loser thereby, and alleged a retainer by the plaintiff, it was held no variance to show a retainer of the defendant by all the partners. *Story v. Richardson*, 6 New Ca. 123.

In actions of tort, as in other cases, it is sufficient to state matters according to their legal effect. Thus, in an action by the consignor of goods against the carrier on a promise to carry them for a certain reward to be paid by the plaintiff, proof of an agreement between the consignor and consignee, that the latter shall pay the carriage, is no variance; the consignor being in law liable to the defendant. *Moore v. Wilson*, 1 T. R. 659. So in an action on the case for damages occasioned by the defendant's negligence in driving his carriage, it is sufficient to show that the damage was occasioned by the negligence of his servant. *Brucker v. Fromont*, 6 T. R. 659.

Variance in matters of inducement and surplusage.] Inducement, whether in an action *ex contractu* or *delicto*, does not require so much precision of proof as the gist of the action. Thus, where the plaintiff declared specially on the sale of a lease commencing at a certain date, and that defendant was to take the stock at a valuation, and then averred the valuation and non-payment; held, that a variance in the date of the lease was immaterial. *Welch v. Fisher*, 8 Taunt. 338. So in an action to recover the double value of goods removed to prevent a distress, the precise amount of rent in arrear is immaterial, and need not be proved as laid. *Gwinnet v. Phillips*, 3 T. R. 643. But in Case for an irregular distress, the landlord to whom the rent was due must be correctly stated; for it is not mere inducement, but may be traversed. *Ireland v. Johnson*, 1 New Ca. 162. Where the plaintiff complained of a nuisance to his land in the defendant's close "used as a private road," if he proves the nuisance in the close, he need not show it to be a private road. *Dukes v. Gostling*, 1 New Ca. 588.

Variance in records, writs, &c.] Where a record is stated by way of inducement and is not the gist of the action, it is not necessary to describe it with a *prout patet*, &c., and it is sufficient to prove it substantially. Thus, in an action for a false return to a *fi. fa.*, where the declaration stated that the plaintiff in Trinity term, 2 G. 4., recovered, &c., *prout patet per recordum*; and a judgment of Easter term, 3 G. 4., was given in evidence, it was held no variance, and the *prout*, &c. was surplusage. *Stoddart v. Palmer*, 3 B. & C. 2. *Phillips v. Shaw*, 4 B. & A. 435. But where the judgment is the gist of the action it is otherwise. Thus in an action of debt on a judgment, if the declaration

state the judgment to have been recovered in such a term, *prout patet*, &c., and it appears in evidence to have been recovered in another term, the variance is fatal. *Rastall v. Straton*, 1 H. Bl. 49. In an action for a malicious prosecution it was averred that the defendant prosecuted an indictment against the plaintiff until afterwards, to wit, on a certain day, the plaintiff was in due manner acquitted; the record of acquittal was on another day; but the court held that the variance was immaterial, and that the averment was substantially proved. *Purcell v. Macnamara*, 9 East, 157. In an action for maliciously arresting and holding the plaintiff to bail, the declaration, in setting out the judgment by default in the former action, stated, "that it was thereupon considered that the plaintiffs should take nothing by their said writ, but that they and their pledges to prosecute should be in mercy, &c.," it was held to be no material variance that the record produced had not the words, "and their pledges to prosecute," but only an &c.; for those words might be rejected as surplusage, the substance of the allegation being the discontinuance of the former suit. *Judge v. Morgan*, 13 East, 547. An averment in an action for an escape, that bail above was put in before a judge at chambers, "as appears by the record of the recognizance," is not supported by evidence of an examined copy of the entry of the recognizance of bail, stating the recognizance to have been taken before the court at Westminster, *Bevan v. Jones*, 4 B. & C. 403. In an action against the sheriff on the stat. 8 Ann. c. 14., an averment that the *fi. fa.* issued out of the King's Bench is not proved by a *fi. fa.* issuing out of the Common Pleas. *Sheldon v. Whittaker*, 4 B. & C. 657. Where a declaration for an escape stated a judgment recovered in Easter term, 5 G. 4., and a *scire facias* and an award of execution by the court, in T. T. and a commitment of the defendant thereupon to the custody of the marshal, it was held not to be necessary to prove the *sci. fa.* *Bromfield v. Jones*, 4 B. & C. 380. See also *Edwards v. Lucas*, 5 B. & C. 339. The description of an act of parliament as "an act passed in the second and third years of the reign, &c." is bad: it should be "in the session of the second and third," &c. *R. v. Biers*, 1 A. & E. 327. Or it may be described as passed in the year indorsed on it. *Semb.* 33 Geo. 3. c. 13.

Variance in deeds.] When a deed is stated in pleading, it must be proved as stated. Therefore, where a covenant is set out absolutely without the qualifying context which belongs to it, the variance will be fatal. *Howell v. Richards*, 11 East, 641. So where the declaration stated a covenant to repair generally, and, on *non est factum* pleaded, it appeared that the covenant contained an exception of "fire, and all other casualties," Lord Ellenborough held the variance fatal. *Tempany v. Burnand*, 4 Camp. 20.; and see *Swallow v. Beaumont*, 2 B. & A. 765. But when it is stated that by a certain deed, "it is witnessed," &c., there can be no variance if the very words of the deed are set out. *Per* Holroyd J., *Ross v. Parker*, 1 B. & C. 362.; acc. *Bushell v. Beavan*, 1 New Ca. 119, 120. Where a deed contains a proviso in defeasance of a covenant, but not incorporated therewith, it is no variance to omit such proviso; *Gordon v. Gordon*, 1 Stark. 294.; unless the proviso be referred to in the covenant, in which case it will be taken to form part of it; *Favasour v. Ormrod*, 6 B. & C. 430.; *Shaw v. Poynter*, 2 A. & E. 312.

A deed may be (and, unless with a *testatum existit*, must be) stated according to its legal effect. Thus, where a lease was stated in a declaration to be made by the plaintiff of the one part, and T. R. of the other part, but appeared in evidence to have been actually made by the plaintiff and his wife of the one part, and T. R. of the other part, it was held to be no variance. *Arnold v. Revoult*, 1 B. & B. 443. If a plaintiff states the legal effect of a deed, the defendant has a right to see it on oyer, and if the meaning varies from that attributed to it in the declaration, in order to take advantage of that variance he should plead *non est factum* without setting out the deed; if it does not support the breach he should set it out and demur; if, however, he sets out the deed on oyer, and pleads *non est factum*, the only question at the trial of that issue is, whether the deed, whereof the tenor is set out, was executed by the defendant or not. *Snell v. Snell*, 4 B. & C. 741. *Paine v. Emery*, 2 C. M. & R. 304. The cases on this head of variance are numerous, but have become of less importance since the late act for amending variances.

Variance in time.] Where the time is material, or where it is alleged by way of description, it must be proved as laid. Thus, in debt to recover penalties for usury, the day on which the money was lent is material, though laid under a *videlicet*, and a variance from that day is fatal. *Fox v. Keeling*, 2 A. & E. 670. So where a writ was described in terms, and on the production of the writ it appeared to be returnable on a different day from that stated, the variance was held to be fatal, though the day was laid under a *videlicet*. *Green v. Rennett*, 1 T. R. 656. So where the declaration alleged that the defendant, on such a day, made his certain bill of exchange, "bearing date the day and year aforesaid," and the real date of the bill was different, this, being a variance in matter of description, was held fatal. *Anon.* 2 Camp. 308. (n).

But where the time is neither material nor matter of description, a variance from it will not be fatal. Thus, where the declaration stated, that the defendant made his certain bill of exchange on such a day, but not that it bore date on that day, a variance was held to be immaterial. *Coxon v. Lyon*, 2 Camp. 307. (n). So where the declaration alleged that a bill drawn on the 18th August, and payable sixty days after sight, was "afterwards, to wit, on the day and year aforesaid," accepted by the defendant, and the bill appeared to be accepted on the 19th September, Lord Ellenborough held the variance immaterial. *Freeman v. Jacob*, 4 Camp. 209. So in an action by indorsee against drawer, where a bill was stated in the declaration to have been indorsed before it became due, and appeared in evidence to have been indorsed after it became due, the variance was held immaterial. *Young v. Wright*, 1 Camp. 139. So in trespass the day is immaterial; but in trespass with a *continuando*, or with a "divers days and times," though the plaintiff may prove any number of trespasses within the time laid, yet, it is said, he can only prove a single act of trespass before the first day. *B. N. P.* 86. See *MSS.* of *Chambre J.* cited 2 *Selv. N. P. Trespass*, V., and *Hume v. Oldacre*, 1 *Stark.* 351.

Variance in place.] Whenever a place is mentioned by way of description, and not merely as venue, a variance will be fatal, even though the local situation need not have been mentioned. *Guest v. Cawmont*,

3 Camp. 235. Where the action is not local, the description of the place may be referred to venue, and a variance will not be material. Thus in an action for negligence, an allegation that the plaintiff's boat was run down in the Thames near the Half-way-reach, is supported by proof that the boat was run down in the Half-way-reach. *Drewry v. Twiss*, 4 T. R. 558. So in an action on the case for setting up a mark in front of the plaintiff's dwelling-house, in order to defame him as the keeper of a brothel, if the declaration, after describing the house as situate in a certain street called A. street, in the parish of O. A. (there being no such parish), afterwards state the nuisance to be erected and placed in the parish aforesaid, it will be ascribed to venue, and need not be proved as laid. *Jefferies v. Duncombe*, 11 East, 226. But in an action on the case for a nuisance in erecting a weir, described in the declaration to be at H., and proved to be at a lower part of the same water called T., the variance was held fatal. *Shaw v. Wrigley*, cited 2 East, 500. Where the allegation of place is descriptive of a contract, it must be proved as laid. Thus, in an action against a carrier, a misdescription of the *termini* in the contract of carriage is fatal. *Tucker v. Cracklin*, 2 Stark. 385. *Woodward v. Booth*, 7 B. & C. 301.

Amendment of variances at Nisi Prius.] As the power of amendment during a trial is immediately connected with the subject of variance, and was conferred on the judges by the legislature for the express purpose of preventing the failure of justice by reason of such variances, it may be proper to consider it in this place. By 9 Geo. 4. c. 15., it is enacted, that it shall and may be lawful for every court of record holding pleas in civil actions, or any judge sitting at Nisi Prius, if such court or judge shall see fit to do so, to cause the record on which any trial may be pending before any such judge or court, in any civil action, when any variance shall appear between any matter in writing or in print, produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs, if any, to the other party, as such judge or court shall think reasonable, and thereupon the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at Nisi Prius, the order for the amendment shall be indorsed on the postea and returned together with the record, and thereupon the papers, rolls, and other records of the court from which such record issued, shall be amended accordingly.

Under this act it was adjudged that it only applied to cases in which a writing was actually produced at the trial. Therefore in an action for libel, where (the writing being lost) parol evidence was given of its contents, there being a variance between that evidence and the libel set forth, it was held that the judge had no power to amend. *Brooks v. Blanshard*, 1 C. & M. 779.

As the powers of this act are much narrower than those conferred by the 3 & 4 Will. 4. c. 42., it is on the latter that parties now chiefly rely. By this act, after reciting (section 23.) that great expense is often incurred, and delay or failure of justice takes place, at trials, by reason of variances as to some particular or particulars between the proof and the record, or setting forth on the record, or document on which the trial is had, of contracts, customs, prescriptions, names, and

other matters or circumstances not material to the merits of the case, and by the mis-statement of which the opposite party cannot have been prejudiced, and the same cannot in any case be amended at the trial, except where the variance is between any matter in writing or in print produced in evidence, and the record: it is enacted that it shall be lawful for any court of record holding plea in civil actions, and any judge sitting at Nisi Prius, if such court or judge shall see fit so to do, to *cause the record, writ, or document* on which any trial may be pending before any such court or judge, in *any civil action*, or in *any information in the nature of a quo warranto*, or proceedings on a *mandamus*, when any variance shall appear between the proof and the recital or setting forth on the record, writ, or document on which the trial is proceeding, of any *contract, custom, prescription, name, or other matter*, in *any particular or particulars* in the judgment of such court or judge *not material to the merits* of the case, and by which the opposite party *cannot have been prejudiced* in the conduct of his action, prosecution, or defence, to be forthwith amended by some officer of the court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms as to payment of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs and postponement, as such court or judge shall think reasonable;—and in case such variance shall be in some particular or particulars in the judgment of such court or judge *not material to the merits* of the case, but such as that the opposite party *may have been prejudiced thereby* in the conduct of his action, prosecution, or defence, then such court or judge shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record or postponing the trial as aforesaid, as such court or judge shall think reasonable;—and after any such amendment the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury, and otherwise, as if no such variance had appeared; and in case such trial shall be had at Nisi Prius or by virtue of such writ as aforesaid, the order for the amendment shall be indorsed on the postea or the writ, as the case may be, and returned together with the record or writ, and thereupon such papers, rolls, and other records of the court from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly; and in case the trial shall be had in any court of record, then the order for amendment shall be entered on the roll or other document upon which the trial shall be had;—provided that it shall be lawful for any party who is dissatisfied with the decision of such judge at Nisi Prius, sheriff, or other officer respecting his allowance of any such amendment, to apply to the court from which such record or writ issued, for a new trial upon that ground, and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit, or the court shall make such other order as to them shall seem meet.

By section 24. it is enacted, that the said court or judge shall and may, if they or he think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence, and thereupon

such finding shall be stated on such record or document; and, notwithstanding the finding on the issue joined, the said court, or the court from which the record has issued shall, if they shall think the said variance immaterial to the merits of the case, and the mis-statement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case.

Cases on the 3 & 4 Will. 4. c. 42.] Since this act it has been said, that "parties must not come down to trial on the ground that there is a variance which they suppose a judge will not rectify;" *Doe v. Edwards*, 1 M. & Rob. 321.; and the courts will amend in the very point in issue, though one party has previously notified to the other his intention to insist on the variance. *Gayler v. Farrant*, 4 New Ca. 257. *Whitwill v. Scheer*, 8 A. & E. 301. The amendment must be during the trial and before verdict. *Brashier v. Jackson*, 6 M. & W. 549. The record may be amended, though there is also a demurrer on the record which may be affected by the amendment. *Semb. Duckworth v. Harrison*, 5 M. & W. 427. Amendments will not be refused on the ground of the action being harsh or oppressive. *Doe v. Edwards*, *supra*. The discretion of the judge at Nisi Prius, to refuse an amendment, cannot be controlled by a subsequent application in banc; *Doe v. Errington*, 1 A. & E. 750. (n); unless it be by consent of the parties reserved at Nisi Prius before the verdict is recorded; *Roberts v. Snell*, 1 M. & G. 577.; though it is otherwise if the amendment be allowed. See sect. 23. *ad finem*.

Where the declaration stated service of a copy of subpoena on the defendant, and it was proved that the copy was confined to so much as related to the defendant, Lord Tenterden amended the declaration accordingly, and the amendment was afterwards upheld in banc. *Massterman v. Judson*, 8 Bing. 224. A variance in the name of the payee of a bill, not being a party to the action, will be amended. *Parks v. Edge*, 1 C. & M. 429. So the local description of premises in ejectment; *Doe v. Edwards*, 1 M. & Rob. 321.; and the date of the demise. *Doe v. Leach*, 9 Dowl. P. C. 877. Where there was a joint demise, Taunton J. refused to allow the declaration to be amended by making two several demises; *Doe v. Errington*, 1 M. & Rob. 343.; nor will the judge, under this act, amend by striking out inuendoes at the trial. *Prudhomme v. Fraser*, *id.* 435. In Case for fraudulent representation; a variance in the defendant's representation will be amended, if it makes no difference in the merits. *Mash v. Denham*, *id.* 442. Where it is probable that the defendant would have pleaded differently if a contract had been properly stated, an amendment *instantan* will not be allowed; but it is otherwise if it appears from the evidence at the trial that no other plea could have been supported. *Ivey v. Young*, *id.* 545. A promise to pay may be amended into a promise to *guarantee*. *Hanbury v. Ella*, 1 A. & E. 61. The amount of a penalty in a bond sued on, may be amended. *Hill v. Salt*, 2 C. & M. 421. A declaration on an acceptance payable at A., "and not elsewhere," may be amended by striking out the latter words. *Higgins v. Nichols*, 7 Dowl. P. C. 551. In assumpsit the declaration averred that a railroad was completed "for the general conveyance of passengers;" the plea traversed the completion for the general, &c.; held, that the record was amendable by

expunging the words in italics from both declaration and plea. *Evans v. Fryer*, 10 A. & E. 609. A note, as declared upon, may be altered as to date, parties, and duration, where it appears that there was no other note between the parties. *Beckett v. Dutton*, 7 M. & W. 157. The terms of the tenancy in an avowry may be amended, though issue has been taken on them. *Gayler v. Farrant*, 4 New Ca. 286. An avowry under stat. 11 Geo. 2. c. 19. s. 22., may be altered into a common law avowry ; or, where pleaded by assignee of the reversion of part of the premises, may be reduced to the proportionate rent of that part. *Roberts v. Snell*, 1 M. & G. 577. But where the declaration stated a demise and a breach of agreement for quiet enjoyment, the court held that the judge at Nisi Prius had rightly refused to alter it into an action on an agreement for a lease with a breach of want of title to grant it. *Brashier v. Jackson*, 6 M. & W. 549. Where the amendment in a special assumpsit consists in a reduction of the demand on the defendant, defendant is entitled to costs if he submit to pay the reduced demand ; but if he disputes the right *in toto*, he is entitled only to the costs occasioned by the mis-statement. *Smith v. Brandram*, 2 M. & G. 244. An instrument, declared on as a bill, was allowed to be amended as a note ; and Alderson B. at the same time amended the judge's order for admitting the handwriting accordingly. *Moillet v. Powell*, 6 C. & P. 233. A contract, as carriers, may be altered into one as wharfingers ; and if the circumstances shew that defendant might have pleaded differently to the amended declaration, the judge will postpone the trial in order to give time to plead *de novo*. *Parry v. Fairhurst*, 2 C. M. & R. 190.

Declaration for an escape : pleas, 1. not guilty, 2. no arrest ; the evidence proved a negligent omission to arrest, which was found specially by the jury, and indorsed agreeably to sect. 24. The jury found damages for plaintiff, and found both pleas for defendant : held, that plaintiff was entitled to judgment and general costs, and defendant to the costs of the issues. *Guest v. Elwes*, 5 A. & E. 118. It follows, therefore, that the variance in the above case might have been amended by the judge of assize. But where an avowry stated a Michaelmas holding, to which plaintiff pleaded a tender and non tenuit, and the jury found an *old* Michaelmas holding, and that the plaintiff had tendered the rent, whereupon the judge refused to amend the second issue, but directed the finding to be indorsed ; it was held, that the court above ought not to give judgment for the defendant upon such indorsement, though they had no power to expunge it. *Knight v. M'Donnell*, 12 A. & E. 438. Where the mis-statement may have prejudiced the defence, the course is to permit the amendment at Nisi Prius on terms : and accordingly, in two cases of slander, a material variance in the words was amended on the terms of the plaintiff's withdrawing the record and paying costs of the day, with liberty to defendant to plead *de novo*. *Per* Patteson J., *Lejeune v. Dennett*, *Winton Sp. Ass.* 1835, and *per* Bolland B., *Sheers v. Philp*, *Launceston Sp. Ass.* 1836.

Though the judge at Nisi Prius, may impose terms in granting amendments, yet the court above has no similar power when called upon to give judgment on a special finding under sect. 24. *Guest v. Elwes*, *supra*.

In trespass for taking mirrors and handkerchiefs, defendant justified as to mirrors, but not as to handkerchiefs ; Parke B., held that no amendment could be made under 3 & 4 W. 4., though the evidence justified both. *John v. Currie*, 6 C. & P. 618.

ONUS PROBANDI.

Affirmative to be proved.] The rule with regard to the burden of proving the issue is generally stated to be, that the party who asserts the affirmative is bound to prove it. Thus in an action for a loss occasioned by the barratry of the master of a vessel, it is not incumbent on the plaintiff, after proving the barratrous act, to prove also that the master was *not* the owner, or freighter; for that would be calling on him to prove a negative; the proof of that fact, which operates in discharge of the defendant, lies upon him. *Ross v. Hunter*, 4 T. R. 33. So where, in an action on an agreement to pay 100*l.* if the plaintiff would not send herrings to the London market and particularly to the house of J. S., the plaintiff proved that he had sent no herrings during the twelvemonth to that house; it was held sufficient to entitle him to recover, no proof being given by the defendant that the plaintiff had sent herrings within the year to the London market. *Calder v. Rutherford*, 3 B. & B. 302. In an action against an attorney for negligently letting judgment go by default, it lies on the defendant to shew there was good ground for doing so, and not on the plaintiff to shew there was a good defence to the action. *Godefroy v. Jay*, 7 Bing. 413. There are, however, some exceptions to this rule:

Where the presumption of law is in favour of the affirmative.] Where the presumption of law is in favour of the affirmative, as where the issue involves a charge of a culpable omission, it is incumbent on the party making the charge to prove it although he must prove a negative; for the other party shall be presumed innocent until proved to be guilty. As to the presumption of innocence, see *Rosc. Dig. Crim. Ev.* 14. Thus, where in a suit for tithes in the spiritual court, the defendant pleaded that the plaintiff had not read the Thirty-nine Articles, it was held that the proof of the issue lay on the defendant. *Monke v. Butler*, 1 Roll. Rep. 83. *Williams v. East India Company*, 3 East, 199. *R. v. Hawkins*, 10 East, 216. So in an action by the owner of a ship for putting combustibles on board, "without giving due notice thereof," it was held that the plaintiff was bound to prove the want of notice. *Williams v. East India Company*, 3 East, 193. Where the issue is on the due election of the defendant as town councillor, plaintiff, who shews that another, B., had a majority of votes, is bound also to shew that B. was qualified to be elected. *R. v. Ledgard*, 8 A. & E. 535. In actions for negligence against carriers it lies on plaintiff to prove it, and not on defendant to shew reasonable care. *Marsh v. Horne*, 5 B. & C. 327. So, again, where the issue is as to the legitimacy of a child born in lawful wedlock, it is incumbent on the party asserting the illegitimacy to prove it; *Banbury peerage case*, 2 Selw. N. P. 709.; and where the issue is on the life of a person who is proved to have been alive within seven years, the party asserting his death must prove it. See *ante*, "*Presumptive Evidence*," p. 25.

Where the fact is peculiarly within the knowledge of a party.] But where the affirmative is peculiarly within the knowledge of the party charged, the presumption of law in favour of innocence is not allowed to operate in the manner just mentioned, but the general rule applies, viz. that he who asserts the affirmative is to prove it, and not he who

avers the negative. 2 *Russell on Crimes*, 692. 2d ed. Thus in an action on the game laws, though the plaintiff must aver that the defendant was not duly qualified, yet he cannot be called upon to prove the want of qualification. *Spierres v. Parker*, 1 *T. R.* 144. *R. v. Turner*, 5 *M. & S.* 206. In an action against a person for practising as an apothecary without having obtained a certificate according to 55 *G. 3. c.* 194., the proof of the certificate lies upon the defendant, and the plaintiff need offer no evidence of his practising without it. *Apothecaries Company v. Bentley, R. & M.* 159. So where, on a conviction for selling ale without a licence, the only evidence given was that the party sold ale, and no proof was offered of his selling it without a licence; the party being convicted, it was held that the conviction was right; for that the informer was not bound to sustain in evidence the negative averment; and it was said by Abbott, C. J., that the party thus called on to answer for such offence sustains no inconvenience from the general rule; for he can immediately produce his licence; whereas if the case is taken the other way, the informer is put to considerable inconvenience. *R. v. Harrison, Paley on Convictions*, 45 (n), 2d ed. Yet where ejectment is brought for a breach of a covenant to insure "in some office in or near London," it lies on the plaintiff to give, at least, some slight proof of the omission, though it would be otherwise in an action of covenant in which the defendant puts in an affirmative plea that he has insured; *Doe v. Whitehead*, 8 *A. & E.* 571.; and from the observations of the court in that case it would seem that the burden of proof in the instance above cited of convictions, &c. lies on the defendant, not because the matter is peculiarly within his knowledge, for that was said not to vary the rule of law, but because the legislature has in those cases, by a general prohibition, made the act of the defendant *prima facie* unlawful.

The question of the *onus* of proof is connected with that of the right to begin, for which see "*Course of Evidence*," *post*.

PROOF OF DOCUMENTS.

Under the present head will be considered the mode in which the various kinds of documentary evidence must be proved.

Proof of Acts of Parliament and Journals.

Acts of parliament are either public or private. The printed statute-book is evidence of a public statute, not as an authentic copy of the record itself, but as hints of that which is supposed to be lodged in every man's mind already. *Gilb. Ev.* 10. A private act of parliament is usually proved by a copy examined with the parliament roll, *B. N. P.* 225., unless it contains a clause that a copy by the king's printer shall be evidence, when it must be proved to be a copy so printed. But when there is a clause "that it shall be deemed and taken to be a public act, and shall be judicially taken notice of without being specially pleaded," it requires no proof; though it may not have the effect of a public act. *Woodward v. Cotton*, 1 *C. M. & R.* 44., *S. C.* 4 *Tyr.* 689. By stat. 41 *Geo. 3. c.* 90. s. 9., the copy of the statutes of the kingdom of Ireland made by the parliament of the same, printed by the king's printer, shall be received as conclusive evidence of the statutes enacted by the

parliament of Ireland prior to the union of Great Britain and Ireland, in any court of civil or criminal jurisdiction in Great Britain.

The journals of the House of Lords and Commons must be proved by examined copies, and the printed journals are not evidence. *Lord Melville's case*, 29 How. St. Tr. 683.; *R. v. Lord George Gordon*, 2 Doug. 593.

Proof of Records and Judgments.

Upon an issue of *nul tiel record* the proof is by the production of the original record, or by the tenor of it duly certified under a writ of *certiorari*.

Where *nul tiel record* is not pleaded, but it is necessary to prove a record in support of some allegation in the pleadings, &c. the record is to be proved either by an exemplification or an examined copy.

Exemplifications are of two kinds, under the Great seal, or under the seal of the court in which the record is preserved. An exemplification under the Great seal may be obtained of any record of the Court of Chancery, or of any record which has been removed thither by *certiorari*; but private deeds, so exemplified, will not be admitted in evidence. *B. N. P.* 227. An exemplification *temp. Eliz.* produced from the proper custody, and purporting to exemplify a commission from the crown, is evidence, though the Great seal has been lost. *Mayor of Beverley v. Craven*, 2 M. & Rob. 140. An exemplification under the seal of the Exchequer is evidence of a commission out of that court and the return thereto, in respect of crown lands. *Tooker v. Beaufort, Sayer*, 297. So an exemplification of a recovery under the seal of the Great Sessions of Wales; for the authority of the seal is by act of parliament. *Olive v. Guin*, 2 Sid. 145. So of Chester, *S. C. ibid.* And the seals of such courts prove themselves. *Ibid. Com. Dig. Ev. A. 2.*

The judgment in paper, signed by the Master, is not evidence of the judgment, for it is not yet become permanent; *B. N. P.* 228.; nor the minute-book of the clerk of the peace, to prove that an indictment was preferred; *R. v. Smith*, 8 B. & C. 341.; nor the original indictment indorsed as a true bill; *Porter v. Cooper*, 1 C. M. & R. 388.; nor is the minute-book in which the proceedings at sessions are entered, and from which the record is made up, evidence of the names of the justices in attendance at the trial of it. *R. v. Bellamy*, *R. & M.* 171. Where the record alleges an adjournment by A. and others, parol evidence may be given as to the justices actually present. *S. C.* The minutes of an acquittal are evidence of it on a trial before the same court sitting under the same commission. *R. v. Tooke*, cited 8 B. & C. 343. An allegation that an appeal came on to be heard at the sessions must be proved by the production of the record regularly made up in parchment; *R. v. Ward*, 6 C. & P. 366.; but where no record but the minute book is kept by the sessions, such book is evidence. *R. v. Ycoveley*, 8 A. & E. 806. As to proof of judgments, &c. of inferior courts, *vide post*, p. 79, 80.

The precept issued by the sheriff to a mayor for the election of a burgess is proved by an examined copy of the sheriff's return to the crown office with the precept annexed. *Webb v. Smith*, 4 New Ca. 373.

Where an ancient record has been lost, it may be proved to the jury by parol or other testimony; as where the rolls of a court of ancient demesne had been destroyed, an old copy of a recovery in it, under the

hand of the steward, was admitted without other proof, the possession having long gone according to it. *Green v. Proude*, 1 Mod. 117. 1 Vent. 257., S. C. So the enrolment of the decree respecting London tithes under 37 Hen. 8. c. 12., being lost, may be proved by user. *S. C. ib. Macdougall v. Young, R. & M.* 392.

To prove the time of signing a judgment, the day-book kept at the judgment-office is not evidence. *Lee v. Meacock*, 5 Esp. 177.

On a wager whether a decree in equity would be reversed by the House of Lords, a copy of the minutes of the judgment in the Journals is evidence. *Jones v. Randall, Cowp.* 17. But as a judgment of the House, on error from the superior courts of common law, is entered of record, and the record remitted to the court below, it is apprehended that in such case the minutes would not be sufficient.

When a record of the court is complete, an examined copy will be evidence, except upon the issue of *multiel record*. Records of the superior courts at Westminster, &c. are not complete until enrolled on parchment. *Glynn v. Thorpe*, 1 B. & A. 153., B. N. P. 228. The copy of a record must be proved by a witness who has examined it line for line with the original, or who has examined the copy while another person read the original. *Reid v. Margison*, 1 Camp. 469. And it is not necessary for the persons examining to exchange papers, and read them alternately. *Gyles v. Hill, ibid. (n.)*. *Rolf v. Dart*, 2 Taunt. 52. Some account should be given of the original record ; thus, it ought to be shown that the record from which the copy was taken was seen in the hands of the proper officer, or was in the proper place for the custody of such records. *Adamthwaite v. Synge*, 1 Stark. 183., S. C. 4 Camp. 372.

Office Copies.

An office copy in the same court and in the same cause is equivalent to the record of which it is a copy. *Per Lord Mansfield, Denn v. Fulford*, 2 Burr. 1179. An office copy of depositions in Chancery is evidence in that court, but will not be admitted in a court of common law without examination with the original ; *B. N. P.* 229. ; *Highfield v. Peake, M. & M.* 109. ; unless perhaps in the case of the trial of an issue out of Chancery ; *S. C.* But see *Burnand v. Nerot*, 1 C. & P. 578. By 7 G. 4. c. 57. s. 74., office copies of proceedings in the Insolvent Court are made evidence.

Where a copy is made by a person specially entrusted to make copies and to deliver them to the parties as part of their title, it is admissible in evidence without proof of its having been actually examined. *B. N. P.* 229. *Appleton v. Lord Braybrook*, 6 M. & S. 37, 38. Thus, the chirograph of a fine is evidence of the fine, the chirographer being appointed to make it ; but it is not evidence of the proclamations. *B. N. P.* 230. By 5 & 6 Will. 4. c. 82., the office of chirographer, &c., is abolished ; but the copies, &c., made by the officer of C. P. substituted for him, are, by sect. 4., made as available in evidence as they would by law have been if made by the former officer. The indorsement by the proper officer on a deed of bargain and sale, enrolled according to stat. 27 Hen. 8. c. 16., is evidence of the enrolment ; *Kinnersley v. Orpe*, 1 Doug. 56. ; and the date of enrolment endorsed by the clerk of the enrolments is conclusive evidence of the date. *R. v. Hopper*, 3 Price, 495. So a copy of an examination on interrogatories taken at a judge's chambers, proved to be signed by the judge and delivered out by his clerk, is

admissible without proof of examination with the original. *Duncan v. Scott*, 1 *Camp.* 101. But a copy of a judgment, purporting to have been examined by the clerk of the treasury (who is not entrusted to make copies), is not admissible without proof of its examination with the original. *B. N. P.* 229. Copies of records, in the custody of the Master of the Rolls under 1 & 2 Vict. c. 94., purporting to be sealed or stamped with the seal of the Record office, are evidence without further proof. Sect. 13.

Proof of Verdicts.

When a verdict is offered as evidence of the truth of the facts found, the *postea* alone is not sufficient; but the judgment must also be proved, to show that it has not been arrested, nor a new trial granted; *Pitton v. Waller*, 1 *Str.* 162.; *B. N. P.* 234.; except in the case of a feigned issue, when no judgment is entered up. *B. N. P.* 234. But ~~semb.~~ the verdict should in that case be shown to be satisfactory by proof of the decree. *Ibid.* The *Nisi Prius* record with the *postea* endorsed, or with a minute of the verdict endorsed by the officer of the court, is sufficient, where the only object is to show that the cause came on to be tried. *Pitton v. Waller*, 1 *Str.* 162. *R. v. Browne, M. & M.* 315. But, without such minute, the *Nisi Prius* record is no evidence of the trial. *Per Lord Tenterden C. J., Ibid.*

In an action for a moiety of the money paid by the plaintiff under a verdict recovered in a suit against the plaintiff and defendant jointly, the *Nisi Prius* record and *postea* has been held to be evidence of the verdict and damages in the former suit without proof of the judgment, because the plaintiff might pay the debt at that stage of the cause to save expense. *Foster v. Compton*, 2 *Stark.* 365. But it is not admitted as evidence of the costs of suit. *S. C.* So it was held by Lord Kenyon, that the production of the *postea* in a former cause between the same parties, would support a plea of set-off to the extent of the verdict. *Garland v. Scoones*, 2 *Esp.* 648. The two last cases seem to depend on the principle that the verdict is evidence *per se*, as between the parties privy to it, of the amount of the debt in question.

Proof of Writ.

A writ must be proved by a copy of the record of it after its return; and this is said to be necessary whenever it is the gist of the action; *B. N. P.* 234.; otherwise the writ itself may be produced; or secondary evidence given, when its non-production is accounted for. A copy of the judgment-roll, containing an award of an *elegit* and the return of the inquisition, is evidence of the *elegit* and inquisition. *Ramsbottom v. Buckhurst*, 2 *M. & S.* 565. To prove that the defendant issued a writ, it is not sufficient secondary evidence to produce the filacer's book, unless it be shown that it has not been returned, but is in the defendant's hands. *Edmonstone v. Plaisted*, 4 *Esp.* 160. Where a writ is pleaded with a *prout patet*, and *nul tiel record* is replied, it must be proved by the production of the record, as in other cases of records; *supra*, p. 73.

Proof of Inquisitions.

Where the return to an inquisition is given in evidence, it is in general necessary to show that the inquiry has been made under proper authority. On this head some distinctions are observable. Inquests

of Office are either by commission under the Great seal, as offices of entitling, &c.; or by commission or writ under the seal of the Exchequer; or they are taken *ex officio*, as by coroners, escheators, &c. The returns made under any of the above special commissions, or writs, are inadmissible as evidence unless the commission be proved, or the want of it accounted for. But inquisitions taken by officers acting under a *general* commission or appointment, as escheators, &c., seem to be admissible on principle without further evidence of authority than that they were acting as such officers. See generally as to the nature of inquests of office, 3 *Bl. Comm.* 258. 16 *Viner*, 79. *tit. Office*.

In the case of an inquisition *post mortem* and such private offices, the return cannot be read without also reading the commission under which it was taken; unless, as it seems, the inquisition be old. *Vin. Ab. Ev.* (A. b. 42.) In cases of more general concern, such as the return to the commission in Henry the Eighth's time to inquire of the value of livings, the commission requires no proof. *B. N. P.* 228. So an ancient extent of crown lands found in the proper office, purporting to have been taken by a steward of the King's lands, and following in its form the direction of the statute 4 Ed. 1., will be presumed to have been taken under competent authority, though the commission cannot be found. *Rowe v. Brenton*, 8 B. & C. 747. And there are many cases to show that an old commission may be presumed; see references, *S. C.* 3 *M. & R.* 171. The inquisition is admissible, though it has become illegible in material parts. *Anderton v. Magawley*, 3 Bro. P. C. 208.

Proof of Rule of Court, and Judge's Order.

A rule of court, produced under the hand of the proper officer, need not be proved to be a true copy. *Selby v. Harris*, 1 *Ld. Raym.* 745. *Still v. Halford*, 4 *Camp.* 17. *Duncan v. Scott*, 1 *Camp.* 102. Where a court (as that of Insolvent Debtors) prints and circulates copies of its rules for the guidance of its officers, one of such copies is evidence of the rules, without showing it to have been examined with the original. *Dance v. Robson*, *M. & M.* 294. But the rules must be shown to have been sanctioned by the court, in order to support an indictment for perjury on an affidavit required by them. *R. v. Kooops*, 6 A. & E. 198.

A judge's order may be proved either by producing the order itself, signed by the judge and delivered out in the usual way; or by proof of the rule making it a rule of court. *Still v. Halford*, 4 *Camp.* 17. A rule of court, however, is not matter of record in the strict sense of the word. *R. v. Bingham*, 3 Y. & J. 110.

Proof of Proceedings in Chancery.

A decree in Chancery may be proved by an exemplification; or by an examined copy; or by production of a decretal order in paper with proof of the bill and answer. *Trowel v. Castle*, 1 *Keb.* 21. *B. N. P.* 244. And it has been held, that the bill and answer need not be proved if they are recited in the decretal order. *Ibid. Com. Dig. Ev.* (C. 1.) The rule laid down in a book of authority is, that where a party intends to avail himself of the contents of a decree, and not merely to prove an extrinsic collateral fact (as that a decree was made by the court), he ought regularly to give in evidence the proceedings on which the decree is founded. 1 *Phill. Ev.* 373. And see *Peake Rev.*

74. *Hewitt v. Piggott*, 5 C. & P. 75. Still, if the decree itself contains all the facts required, it has been held unnecessary to produce the bill and answer, though it is otherwise where it is material to show the particular issue raised. Thus, in an action against the sheriff for an escape under an attachment issued out of Chancery for non-payment of costs, the decree may be given in evidence by the plaintiff without the bill and answer. *Blower v. Hollis*, 1 C. & M. 396., S. C. 3 Tyr. 356. But this was doubted at Nisi Prius by Lord Abinger C. B., who refused to permit a plaintiff to prove an order for an injunction against him, obtained at the suit of the defendant, unless he also put in the bill and answer. *Attwood v. Taylor*, 1 M. & G. 289, 290. Where an answer is read as an admission of the defendant, he is entitled to have the bill also read as part of the plaintiff's case. *Pennell v. Meyer*, 2 M. & Rob. 98. But where a bill, answer, and decree are put in evidence to prove a fact which appears on the face of those documents to have been in issue, the party producing them is not bound also to put in the depositions as part of his own case. *Laybourn v. Crisp*, 4 M. & W. 320.

An answer in Chancery is proved by the production of the bill and answer, or by examined copies of them; but on proof by the proper officer that the bill has been searched for in the office and not found, the answer may be read without the bill. *Gilb. Ev.* 55. Some proof of the identity of the parties is requisite; *Rees v. Bowen*, M'Cl. & Y. 383; which may be proved by a witness, who has seen the handwriting of the defendant to the original answer, though it is not produced in court. *Dartnall v. Howard*, R. & M. 169. It seems that identity may be inferred from intrinsic evidence; as if the name, description, and character of the defendant at law agree with the name and description of the party answering in equity, it is *prima facie* evidence of identity. *Hennell v. Lyon*, 1 B. & A. 182. But see *Rees v. Bowen*, M'Cl. & Y. 383, 391, 392., and "*Proof of Deeds*," *post*, 88.

An answer, offered in evidence merely as an admission of the party on oath, is sufficiently proved by an examined copy without proof of a decree, or of the party's handwriting. *Lady Dartmouth v. Roberts*, 16 East, 334. So where a witness on a trial at law gave evidence at variance with what he had previously sworn in an answer in Chancery, it was held that an examined copy of that answer was admissible to contradict him. *Ewer v. Ambrose*, 4 B. & C. 25. And see *Highfield v. Peake*, M. & M. 109. *post*, p. 78. A letter written by the plaintiff's agent, referred to by the plaintiff in his answer to a bill in Chancery filed by a third person, and deposited by consent of parties with a clerk in court, is evidence against the plaintiff in an action at law, without reading the answer in Chancery. *Long v. Champion*, 2 B. & Ad. 284. But *quære*, whether, where A. has obtained sight of a letter or document of B. by means of a bill of discovery, to which B. has put in answer with the document annexed, A. can read it in evidence without also reading the whole answer? See S. C. *ibid*.

Proof of Depositions.

What a witness, since dead, has sworn on a trial between the same parties may be given in evidence either from the judge's notes, or from notes that have been taken by any other person who will swear to their accuracy; or it may be proved by any person who can swear from

memory. *Per Mansfield C. J., Mayor of Doncaster v. Day*, 3 Taunt. 262. *Strutt v. Bovingdon*, 5 Esp. 57. The witness must be prepared to prove the very words of the former witness. *Ennis v. Donisthorpe*, 1 Phill. Ev. 219, 6th ed., *R. v. Jolliffe*, 4 T. R. 290.

Depositions in a suit in Chancery are not, in general, admissible without proof of the bill and answer; *B. N. P.* 240., *Gibb. Ev.* 62.; unless so ancient that no bill or answer can be found; *Gibb. Ev.* 64., *Byam v. Booth*, 2 Price, 234. (n); *Bayley v. Wylie*, 6 Esp. 85.; or unless the depositions are offered in evidence as containing an admission merely, or for the purpose of contradicting a witness. 1 Phill. Ev. 375. In general, depositions taken in *perpetuam rei memoriam* are not evidence at law, unless an answer be put in and proved; but if the defendant in equity is in contempt, or has neglected to take advantage of an opportunity to cross-examine, the depositions may be read on proof of the bill, without the answer; *B. N. P.* 240.; so in case of a bill filed for a commission to examine witnesses *de bene esse*; *Cazenove v. Vaughan*, 1 M. & S. 4. Whether the deposition be taken on a bill to perpetuate testimony, or a bill to examine *de bene esse* (which are distinct proceedings) it is not evidence without proof of the inability of the witness to attend; but a court of equity may make a special order to read it without such proof, and without proof of the bill, answer or other proceedings. See *Jeremy's Equity Jurisdiction*, p. 271—280.; and the authorities there cited.

On an issue out of Chancery, an examined copy of the depositions of one of the witnesses was allowed to be read for the purpose of contradicting the evidence of the same witness on the trial of the issue; *Highfield v. Peake*, M. & M. 109. But in *Bastard v. Smith*, 10 A. & E. 213., Tindal C. J., would not permit a witness to be examined as to the contents of his former deposition without first refreshing his memory with the original; and the court of Q. B., on that ground, allowed the costs of the attendance of an officer of the court of Chancery to produce the original. An examined copy of an affidavit of a third person filed at chambers, and used by defendant on a motion, is evidence against him on a subsequent trial; *per Abbott J.*, in *Doe v. Wood*, *Manning's Index*, 122. An examined copy of an affidavit, filed in the court of Chancery, is evidence without proof of the handwriting of the party making it, if it be shown that it has been used, or acted upon, by him; though, in case of an indictment for perjury, the handwriting must be proved. *R. v. James*, 1 Show. 397. *Crook v. Dowling*, 3 Doug. 75., and note, *ibid.* *Rees v. Bowen*, M'C. & Y. 383.

Depositions taken on interrogatories under a commission (before 1 W. 4. c. 22.) were not admitted in evidence without production of the commission, unless the depositions were of long standing. *Bayley v. Wylie*, 6 Esp. 85. *Rowe v. Brenton*, 8 B. & C. 765. Affidavits taken by a commissioner of the court of King's Bench are admissible without proving the commission: acting as such is enough; *R. v. Howard*, 1 M. & Rob. 187.; and it seems that depositions, taken before a judge by consent in a cause, may be proved at the trial by production of a copy signed by the judge, and delivered by his clerk, without verifying the copy. *Duncan v. Scott*, 1 Camp. 103. It must also be proved, that the witness is dead, absent, abroad, or not to be found. *B. N. P.* 239. *Anon.* 2 Salk. 691. *Benson v. Olive*, 2 Stra. 920. And this must be proved by a witness who knows it otherwise than by hearsay. *Robinson v. Mar-*

Id., 2 M. & Rob. 375. Where the witness had actually sailed, the depositions were allowed to be read, though the vessel was, at the time of trial, driven back into port by contrary winds. *Fonwick v. Agar*, 6 Esp. 92. It is not sufficient that the witness is a seafaring man, and that he lately belonged to a vessel lying at a certain place, without proving that some effort has been recently made to procure his attendance. *Falconer v. Hanson*, 1 Camp. 172. Where depositions on interrogatories are read on the part of the plaintiff, the whole, including the answers to the cross-interrogatories, must be read as part of his case. *Temperley v. Scott*, 5 C. & P. 341.

The powers of 33 Geo. 3. c. 63. s. 40, 44., as to depositions in India, are extended, by 1 W. 4. c. 22., to all places under his Majesty's dominion, and to all actions in the courts of law at Westminster; and these courts and the judges of them have power to order the examination of witnesses by certain officers or other persons named in the order; or to issue commissions to examine them in places out of their jurisdiction. By sect. 10. "no examination or deposition to be taken by virtue of that act shall be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear, to the satisfaction of the judge, that the examinant or deponent is beyond the jurisdiction of the court, or dead, or unable from permanent sickness, or other permanent infirmity to attend the trial; in all or any of which cases the examinations and depositions certified under the hand of the commissioners, master, prothonotary, or other person taking the same, shall and may, without proof of the signature to such certificate, be received and read in evidence, saving all just exceptions."

The answers to illegal questions put under the authority of a commission may be objected to and struck out at *Nisi Prius*; but not by the party who put the question. *Hutchinson v. Bernard*, 2 M. & Rob. 1. The deposition may be read, though it appears on the face of it that the deponent referred to papers not shown to the commissioners. *Steinkeller v. Newton*, *ibid.* 372. If the deponent is interested, his name may be indorsed on the record. *Adams v. Garrard*, *ibid.* 400. Where the commission has been issued irregularly, or the execution was against good faith, yet, it seems, the judge must receive the depositions at *Nisi Prius*, if there was due notice of execution to the other side; though the court will, under such circumstances, set aside the verdict and grant a new commission. *Steinkeller v. Newton* reported, variously, in 1 Scott, N. R. 148.; 8 Dowl. P. C. 579., and 9 C. & P. 313. Where the commission directs the depositions to be returned, certified copies returned are inadmissible. *Clay v. Stephenson*, 7 A. & E. 185.

Proof of Proceedings in the Ecclesiastical and Admiralty Courts.

The minute book of the Consistory court is said to have been admitted as evidence of a decree for alimony; *Houlston v. Smyth*, 2 C. & P. 25.; and a sentence of separation *a mensa*, &c. was admitted by Lord Kenyon without proof of the libel. *Sedman v. Gooch*, 1 Esp. 6. The sentence of an admiralty court was held evidence of a condemnation without producing the libel and answer, at least if not found, or usually filed, with it. *Per Trevor J.*, in *Wheeler v. Louth*, Com. Dig. Evid. (C. 1.) But it seems questionable whether a sentence in either of these courts is generally admissible without proof of the proceedings in the suit. In the *Duchess of Kingston's Case*, 20 How. Sta. Tri. 377., the

attorney generally objected to the reading of the sentence in the jactitation suit without the libel, allegations, and all other proceedings in it; and they were accordingly all put in evidence. In *Cleeve v. Attorney-General*, *Somerset Sum. Assizes*, 1841, where defendant put in a suit for subtraction of tithe in order to disprove a modus, Rolfe B., required that the depositions, which had been found and were produced with the rest of the proceedings by the registrar, should also be read. In *Leake v. Marquis of Westmeath*, 2 M. & Rob. 394., Tindal C. J., refused to admit a decree for alimony to be given in evidence without proof of all the prior proceedings; and where the decree was affirmed on appeal, his lordship required that the process of appeal should be duly proved, in order to make the decree of the superior court admissible; but he expressed an opinion that the depositions filed need not be produced. See *Phillips v. Crawly*, 1 *Freeman*, 83, 84. *Laybourn v. Crisp*, 4 M. & W. 320., cited *anté*, p. 77.

Proof of Judgment in an Inferior Court,

The judgment of a county court, court baron, or other inferior jurisdiction may be proved by production of the book or rolls, containing the proceedings of the court, from the proper custody; and if not made up in form, the minutes of the proceedings will be evidence; or an examined copy of such proceedings or minutes will be sufficient. *R. v. Hains*, *Comb.* 337. 12 *Vin. Ab.* (A. b. 26). *Hennell v. Lyon*, 1 B. & A. 185. *R. v. Smith*, 8 B. & C. 343. *Chandler v. Roberts*, *Peake Evid.* 80. But this rule does not extend to proceedings of the court of quarter sessions on the crown side, which is not an inferior court. *R. v. Smith*, *supra*. In proving the judgment of an inferior court, as the county court, evidence should also be given of the proceedings previous to judgment. *Com. Dig. Ev.* (C. 1.) See *Fisher v. Lane*, 2 W. Bl. 836. *Thompson v. Blackhurst*, 1 N. & M. 266.

For evidence of proceedings before the courts of bankruptcy, see *post*, "Actions by and against Assignees," and for proof of insolvent's discharge, see "Assumpsit, Defence."

Proof of Court Rolls.

In order to prove the title of a copyholder, the court rolls may be produced without producing the stamped copy; *Doe v. Hall*, 16 *East*, 208.; or they may be proved by examined copies; *Doe v. Mee*, 4 B. & Ad. 617.; or by the stamped copy delivered and signed by the steward; *Littlel. s.* 75.; 1 *Scriven Copyh.* 590.; *Peake Evid.* 94. And where an admittance is more than thirty years old, proof of the signature of the steward is unnecessary. *Dean and Chapter of Ely v. Stewart*, 2 *Atk.* 45. *Rowe v. Brenton*, 3 M. & R. 296. But see *Duke of Somerset v. France*, *Fortescue*, 43. It has been held that a surrender and presentment may be proved by the draft of an entry, produced from the muniments of the manor, and the parol testimony of the foreman of the homage jury who made the presentment. *Doe v. Calloway*, 6 B. & C. 484. And it seems that such a draft is admissible though there may have been a subsequent regular enrolment. *Ibid.* 495. And if the original roll is put in, it may be shown to be incorrect by producing the minute of the steward, or by other evidence. *Ibid.* 494. 1 *Scriven*, 253. Where a surrender was made in 1774, and there was no record of it on the court rolls, the books of the manor, containing a

record of the admission which recited the surrender, were received as evidence of the surrender. *R. v. Thruscross*, 1 A. & E. 126. As to proof of a recovery in ancient demesne, see *Green v. Proude*, *anté*, p. 73, 74. A presentment in a manor book will not be rejected because part of it has been cut off, there being no ground for supposing the mutilation to be fraudulent. *Evans v. Rees*, 10 A. & E. 151.

By the stamp act, 55 Geo. 3. c. 184., court rolls need not be stamped; but surrenders and admittances *out* of court, and copies of surrenders and admittances made *in* court, must be duly stamped as in the schedule of the act, unless it be a surrender to the use of a will. A surrender *out* of court may be proved by an unstamped copy; *Doe v. Mee*, 4 B. & Ad. 617. And *quære*, whether any mere examined copy, proved in evidence, requires a stamp? for the copy mentioned in the schedule seems to mean the copy delivered by the steward under sect. 33. of the act. And it seems that, as between surrenderor and surrenderee, the court rolls, containing a presentment of a surrender out of court, are primary evidence of the surrender, without producing the original stamped surrender. *Doe v. Olley*, 12 A. & E. 481.

Proof of Probate.

Where the title to personal property under a will is in question, the original will cannot, in general, be read in evidence; but the probate must be produced. *R. v. Barnes*, 1 Stark. 243. *Pinney v. Pinney*, 8 B. & C. 335. The seal of the Ecclesiastical Court on the probate proves itself. *Kempton v. Cross*, *Hardw.* 108. But the probate is not the only evidence of the will; for the act book of the Ecclesiastical Court, containing an entry of the will having been proved and of probate granted to the executors therein named, is admissible evidence of executorship, without accounting for the non-production of the probate. *Cox v. Allingham*, *Jacob*. 514. And an indorsement or note at the foot of the original will by the surrogate and deputy registrar, is primary evidence of probate, when no other record of it is kept. *Doe v. Mew*, 7 A. & E. 240. If the probate is lost, it is not the practice of the Ecclesiastical Court to grant a second probate, but only an exemplification, which will be evidence of the proving of the will. *Shepherd v. Shorthose*, 1 *Stra.* 412. To prove the probate revoked, an entry of the revocation in the book of the Prerogative Court is good evidence, where no other record is kept. *Ramsbottom's case*, 1 *Leach*, C. C. 30. (s), 3d ed. As to the authority of probate, and the manner in which it may be impeached in evidence, see *post*, "Effect of Documentary Evidence."

Proof of Letters of Administration.

Administration is proved by the production of the letters of administration, or of a certificate or exemplification thereof, granted by the Ecclesiastical Court; *Kempton v. Cross*, *Hardw.* 108.; *B. N. P.* 246.; or, without producing the letters of administration, by the original book of acts directing the grant of the letters. *Ibid.* *Elden v. Keddel*, 8 *East*, 187. And an examined copy of the act book, stating the grant of letters of administration to the defendant, is proof of his being administrator, without notice to produce the letters. *Davis v. Williams*, 13 *East*, 232. See further, *Williams on Executors*, Pt. v. Bk. 1. Ch. 1.

Proof of Foreign Laws and Judgments.

The written law of a foreign state should be proved by a copy duly authenticated. *Clegg v. Levy*, 3 Camp. 166. *Picton's case*, 30 How. St. Tri. 491. But it should seem that a copy examined with the original is not absolutely necessary. Thus, a French vice-consul has been admitted to prove the French written law of marriage by production of a printed edition of the *Cinq Codes* bought at a shop, and by his own testimony; *Lacon v. Higgins*, 3 Stark. 178., *S. C. Doubl. Ni. Pri.* 38.; and a practising advocate attached to the consulate was admitted to prove the French law of bills of exchange. *Trimbey v. Vignier*, 1 New Ca. 151. Where the plaintiff sued on an agreement expressly made subject to the regulations of the Russian marine, which were in writing, it was held necessary to produce an authenticated copy of them. *Millar v. Heinrick*, 4 Camp. 155. Foreign law must be proved by witnesses of competent skill: thus the law of Scotland respecting marriage cannot be proved by a tobacconist. *R. v. Brampton*, 10 East, 287. But it is otherwise with respect to proof of the Jewish marriage law, which has been allowed *ex necessitate* to be proved by persons in trade, and of inferior station. *Lindo v. Belisario*, 1 Hagg. Con. Rep. 216. An instrument, purporting to be a divorce under the seal of the synagogue at Leghorn, is not admissible without previous proof of the law of the country; *Ganer v. Lanesborough, Peake*, 17.; but Lord Kenyon permitted the party divorced to give parol evidence of her divorce at Leghorn, according to the ceremony and custom of the Jews there. *Ibid.*

A paper purporting to be a copy of a judgment of a colonial court made by the clerk of the court, with a certificate of a notary public, and a certificate by the governor under the seal of the colony that the notary is a notary public, will be no proof of the judgment. *Appleton v. Braybrook*, 6 M. & S. 34. *Semb.*, if the certificate under the colonial seal had exemplified the judgment, it would have been admissible. *S. C. ibid.* The genuineness of the seal of a foreign court must be proved; *Henry v. Adey*, 3 East, 221.; and if a foreign court has an official seal, it must be used for the purpose of authenticating its judgments, and a copy by an officer of the court is not sufficient. *Black v. Braybrook*, 2 Stark. 7. The seal should be used to authenticate its judgments, though so much worn as no longer to make any impression. *Cavan v. Stewart*, 1 Stark. 525. If there be no seal of the court, an examined copy must be obtained; *per* Lord Ellenborough in *Appleton v. Braybrook*, *suprà*; or distinct evidence should be given that the judgment produced is authenticated in the manner usual in that court; as by the signature of the judge, &c. *Alves v. Bunbury*, 4 Camp. 28. A judgment, duly verified by a seal proved to be that of the foreign court, is presumed to be regular and agreeable to the foreign law until the contrary is shown. *Alvon v. Furnival*, 1 C. M. & R. 277.

Proof of Entries in Public Books, Postmarks, &c.

Whenever an original is of a public nature and admissible in evidence, an examined copy is, on grounds of public convenience, also admissible. *Lynch v. Clerke*, 3 Salk. 154. Thus examined copies of the entries in the council book; or of a licence preserved in the Secretary of state's office; *Eyre v. Palgrave*, 2 Camp. 606.; of entries in

the bank-books; *Mortimer v. McCallan*, 6 M. & W. 58.; of a bank note filed at the bank; *Man v. Cary*, 3 Salk. 155.; of entries in the books of the East India Company; *Lord G. Gordon's case*, Doug. 598.; or in the books of the commissioners of land-tax; *R. v. King*, 2 T. R. 234.; or of excise; *Fuller v. Fetch*, Carth. 346.; or in a poll book at an election; *Mead v. Robinson*, Willes, 424.; or a book kept in the chapter-house of a dean and chapter, purporting to contain copies of leases; *Coombs v. Coether*, M. & M. 396.; *Wakeman v. West*, 7 Q. & P. 479.; are all good evidence. A copy of an old deed contained in one of the books of the Bodleian library (which the statutes of the university forbid to be removed) was allowed to be read in evidence. *Downes v. Mooreman*, Bunn. 189. An examined copy of a parish register is evidence; *post*, p. 84. But an examined copy of the register of a marriage in the Swedish ambassador's chapel at Paris is not evidence, *Leader v. Barry*, 1 Esp. 353.; nor, as it seems, the copy of any similar register not kept under the authority of the law of this country; (see *post*, "Effect of Public Registers;") for such registers themselves are not evidence of the facts stated in them. The books of the King's Bench and Fleet prisons, when they are admissible, are not such public documents that a copy of them may be given in evidence; for they are not kept by any public authority. *Salte v. Thomas*, 3 B. & P. 190. A collection of treaties published by the direction of the American government is not sufficient to prove a treaty; a copy examined with the archives should be produced. *Richardson v. Anderson*, 1 Camp. 65. (n).

The *postmark* on a letter is usually taken as genuine without proof; but, if disputed, it is not clear whether the person who made it must be called; or whether it may be proved by any postmaster; or by any one in the habit of receiving letters by the post; or, indeed, whether it requires any proof at all. *Abbey v. Lill*, 5 Bing. 299. *Kent v. Lowen*, 1 Camp. 178. *Arcangelo v. Thompson*, 2 Camp. 620. *Fletcher v. Braddyll*, 3 Stark. 64. In a criminal case, where it was offered in evidence against the defendant as proof of his having put a letter into the post at a particular place, Lord Ellenborough rejected it. *R. v. Watson*, 1 Camp. 215. In *Plumer's case*, R. & R. C. C. 264., the postmark was proved by a stamper at the post-office.

Proof of Entries in Corporation Books.

The books of public corporations are allowed to be given in evidence when they have been publicly kept as such, and when the entries have been made by the proper officer, or by a third person in the absence or sickness of the proper officer. *R. v. Mothersell*, 1 Stra. 93. A book kept by a clerk who was not an officer of the corporation, containing minutes of corporate proceedings, but which had not been kept as the public book of the corporation, was rejected in evidence. *Ibid.* To make the books evidence, it must be shown that they come from the proper custody, as from a chest which has always been in the custody of the clerk of the corporation; *ibid.* *Mercers of Shrewsbury v. Hart*, 1 C. & P. 114. When the entries in the books are admissible as being of a public nature, examined copies are evidence. *Brocas v. Mayor of London*, 1 Stra. 308. And where, in order to prove the defendant a freeman, a copy upon stamped paper was produced of a loose paper upon a file, which the witness said was also on a stamp, and was kept with other similar stamped entries on a file among the

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corporation papers, and it appeared that there was also a book in which the acts of the corporation were kept, and where there was an entry more at large of the freeman's admission, made when he was originally admitted, but there was no stamp in the book, it was held that the loose paper being the only effectual act, as having that which the law requires, viz. the proper stamp, must be looked upon as the proper and original act of the corporation, and that a copy of that was good evidence. *Per Noel J., R. v. Head, Peake Ev.* 92. (n). Papers or entries of a private nature which do not relate to corporate acts must, if admissible, be produced; and copies of them are not evidence, however long they may have been kept among the corporate muniments. *R. v. Gwyn, 1 Stra.* 401.

Proof of Public Registers.

Registers of baptisms, marriages, and deaths, may be proved by examined copies, or by production of the register itself. *B. N. P.* 247. In order to prove the register of a marriage it is not necessary to call the attesting witnesses; but as the register affords no proof of the identity of the parties, some evidence of that fact must be given, as by calling the minister, clerk, or attesting witnesses, if they were acquainted with the parties; or the bell-ringers to prove they rang the bells and were paid by the parties; or the handwriting of the parties may be proved; or persons may be called who were present at the wedding dinner, &c. *Birt v. Barlow, 1 Doug.* 172. To prove the handwriting of the parties in the register it is not necessary to call the subscribing witness. *Per Lord Mansfield, S. C. 50.* If a marriage is proved by a person who was present, it is not necessary to prove the registration, or licence, or banns. *Alkison's case, R. & R., C. C. R.* 109.

The act, still in force for the registration of baptisms and burials by ministers of the church of England, is 52 Geo. 3. c. 146. It provides that verified copies shall be annually sent to the register of the diocese. It seems that the latter, being public documents, are evidence as well as the former, and may be proved by examined copies; *Walker v. Countess of Beauchamp, 6 C. & P.* 552, *per Alderson, B.*; and see *Attorney-General v. Oldham*, cited in *Burn on Parish Registers*, 209. But *quære*, whether the bishop's transcripts, made before that act, can be used, except as secondary evidence? *S. C. 6 C. & P.* 552. By 3 & 4 Vict. c. 92., certain non-parochial registers of births, baptisms, deaths, burials, and marriages, transferred to the custody of the registrar general, are made admissible in evidence, either by producing them, or certified extracts from them, after previous notice to the opposite party of the intention to use them.

The registration of marriage is now regulated by 6 & 7 Will. 4. c. 86. (passed 17 August 1836) which provides that certified copies of entries, purporting to be sealed with the seal of the registrar general's office, shall be evidence of the birth, death, or marriage to which it relates without other proof of such entry. Sect. 38. It should seem that under the same act, the entries of other registrars besides the registrar general may be evidence under certain limitations; sects. 22, 23, 28.; and as well they, as all rectors, curates, &c. are bound to give certified copies; sect. 35; but it is not expressly provided that these latter certificates shall be evidence without further verification.

The act 6 & 7 Will. 4. c. 85., for amending the law of marriage, pro-

vides for the registration of marriages solemnized under that act, and is also incorporated with the above act, c. 86., and it enacts that the provisions of the act, c. 86., relating to the register of marriages, or certified copies thereof, shall extend to marriages under the act, c. 85.

Proof of Ship's Register.

By stat. 6 Geo. 4. c. 110. s. 43., it is enacted, "that the collector and comptroller of his Majesty's customs at any port or place, and the person or persons acting for them respectively, shall, upon every reasonable request by any person whomsoever, produce and exhibit for his inspection and examination any oath or affidavit, taken or sworn by any owner or proprietor" (of the vessels mentioned in the act), "and also any register or entry in any book of registry required by that act to be made or kept relative to any ship or vessel; and shall, upon every reasonable request by any person whomsoever, permit him to take a copy or an extract thereof respectively; and that the copy of any such oath or affidavit, register, or entry, shall, upon being proved to be a true copy thereof respectively, be allowed and received as evidence upon every trial at law, without the production of the original, and without the testimony or attendance of any collector or comptroller, or other person or persons acting for them respectively, in all cases as fully, and to all intents and purposes, as such original or originals, if produced by any collector, comptroller, or other person or persons acting for them, could or might legally be admitted or received in evidence." This act is repealed, but the above clause is re-enacted by 3 & 4 Will. 4. c. 55. s. 40., substituting the word "declaration" for "affidavit."

Custody of Ancient Writings.

In general the admissibility of ancient writings, which are incapable of direct proof, depends upon the custody from which they are produced, and from which their genuineness may be inferred. Thus ancient ecclesiastical terriers are not admissible unless found in the proper repository, viz., the registry of the bishop, or of the archdeacon of the diocese; *Atkins v. Hatton*, 2 Anstr. 386.; *Potts v. Durant*, 3 Anstr. 795.; or, as it seems, the church chest; *Armstrong v. Hewitt*, 4 Price, 216.; which are also the proper repositories for the vicar's books. *Ibid.* A terrier found in the registry of the dean and chapter of Lichfield has been admitted as against a prebendary of Lichfield. *Miller v. Foster*, 2 Anstr. 387 (n). But mere private custody is not sufficient. *Potts v. Durant*, 3 Anstr. 789. A terrier A. D. 1693 in an old register, purporting to be a parish register, produced from the vicarage house, kept exclusively by the vicar and signed by the vicar and three others not described, was considered inadmissible evidence against a modus. *Atkins v. Drake*, M'Cl. & Y. 213. On an issue respecting the boundaries of two parishes, certain old papers were produced by the plaintiff (the rector of one of the parishes), which had come into the possession of the son of a former rector on his father's death, and which had been delivered by him, as papers belonging to the parish, to the witness (an attorney); it was held that the papers were sufficiently authenticated without calling the son of the former rector. *Earl v. Lewis*, 4 Esp. 1. Where a book, purporting to be the book of a former rector, came out of the custody of the defendant, the grandson of the former rector, the proof was held insufficient; it not appearing how it came into the de-

defendant's possession. *Randolph v. Gordon*, 5 Price, 312. In a suit for tithes, a receipt purporting to be a receipt given by a former rector forty-five years ago to a person of the same name as the defendant, and produced from the custody of the defendant, has been held admissible. *Bertie v. Beaumont*, 2 Price, 303. Where A., the defendant in a tithe suit, offered in evidence a receipt purporting to be a receipt from one B. to one A. fifty years before, without showing who B. was, or where the paper had been kept, it was rejected. *Manby v. Curtis*, 1 Price, 225, Wood B. *disentente*. An ancient writing, enumerating the possessions of a monastery, produced from the Herald's Office, is inadmissible. *Lygon v. Strutt*, 2 Anstr. 601. So an old grant to an abbey, contained in a manuscript entitled "Secretum Abbatis" in the Bodleian library, was rejected, as not coming from the proper repository. *Michell v. Rabbetts*, 3 Taunt. 91.; *The Bank v. Anderson*, 4 Scott, 83. So an ancient grant to a priory from the Cottonian manuscripts in the British Museum was rejected; it not appearing that the possession of the grant was connected with any person having an interest in the estate. *Swinerton v. Marquis of Stafford*, 3 Taunt. 91.

In order to make an ancient document, as a manor book, evidence, it is not enough that it is produced in court by the counsel of the party to whose custody it belongs, or by his steward, or by the party himself: some witness, who can speak as to the custody of it, must be sworn in court. *Evans v. Rees*, 10 A. & E. 151. And if any suspicion arises as to the genuineness of it, the judge, before he admits it in evidence, will require information where it has been kept for some years back; when it was first seen, &c. *R. v. Mothersell*, 1 Stra. 93. Indeed, in this, as in other cases, the admissibility of the evidence is for the determination of the court, and a party cannot insist on submitting to the jury such an instrument as a matter of right, until he has given satisfactory grounds for assuming it to be genuine.

The proper custody means that in which the document may be reasonably expected to be found, although in strictness it ought to be in another place; thus a cartulary in the possession of the owner of a part of the abbey lands is admissible, though not owner of the greater part; yet the Augmentation Office is the proper place of deposit. *Bullen v. Michel*, 2 Price, 413. So a collector's book, produced from the possession either of his executor or his successor. *Jones v. Waller*, 3 Gwill. 847. So a document relating to a bishop's see may be produced from the custody either of his descendants, or his successors in the see. *Bishop of Meath v. Marquis of Winchester*, Dom. Proc. 3 New Ca. 183.; and see observations, *ibid.* 201.; *Doe v. Samples*, 8 A. & E. 151.; *Doe v. Pearce*, 2 M. & Rob. 240.

In a suit for tithes by a rector against occupiers, the defendants pleaded a modus payable to the vicar for the tithes claimed. It was held, first, that a copy of a vicar's endowment, contained in an old book recording the acts of former bishops of the diocese, was admissible for the plaintiff (the bishop's registry having been searched for the original without success), and that no search was necessary either in the Augmentation Office, or in the vicar's house, although it was expressed in the instrument that one part of it was to remain with the vicar; secondly, that a terrier, appearing to be signed by a former incumbent who was both rector and vicar of the parish, and whose handwriting was proved by the churchwardens, was admissible for the

plaintiff, though it was produced from the custody of an individual who claimed the tithes of a particular district in the parish, and not from the usual depositories. *Tucker v. Wilkins*, 4 *Simons*, 241. The bishop's registry is the proper place for sequestrator's receipts and accounts. *Pulley v. Hilton*, 12 *Price*, 629.

Expired leases, coming from the possession of the lessor, are admissible. *Plaxton v. Dare*, 5 *M. & R.* 1. *Rees v. Walters*, 3 *M. & W.* 527. See further, *post*, 93.

Proof of Execution of Corporation Deeds; and of Seals.

Fixing the common seal is tantamount to delivery. *Com. Dig. Fiat. A. 3.* The seal must be proved by some one who knows it, but it is not necessary to call a witness (not being an attesting witness) who saw it affixed. *Moises v. Thornton*, 8 *T. R.* 307. *Brounker v. Alkyns*, *Stinn.* 2. Some seals, as that of London, require no proof. *Doe v. Mason*, 1 *Exp.* 53. So the seal of the superior Ecclesiastical Courts (*antè*, "Proof of Probate," p. 81.), and of other superior courts. *Vin. Evid. A. b. 69. Antè*, p. 73. But the seal of a colonial court must be proved. *Henry v. Adey*, 3 *East*, 221. So of the Bank of England; *Semb. Doe v. Chambers*, 4 *A. & E.* 410.; and of the Apothecaries' Company. *Chadwick v. Bunning*, *R. & M.* 306. Though the seal need not be shown in the first instance to be fixed by the proper person, yet the deed may be invalidated by proof of its being fixed by a stranger, or without proper authority. *Anon.* 12 *Mod.* 423. *Clarke v. Imperial Gas Co.* 4 *B. & Ad.* 315. *R. v. Haughley*, *ibid.* 650. It is not settled whether the attesting witness of a corporation deed need be called; *Doe v. Chambers*, *suprà*; nor whether such a deed proves itself after thirty years; *R. v. Bathwick*, 2 *B. & Ad.* 648.

Proof of Deeds and Private Writings.

Attesting witness must be called.] Wherever a deed or other instrument is subscribed by attesting witnesses, one of them, at least, must be called to prove the execution; and such testimony cannot be dispensed with, though the defendant has admitted the execution in his answer to a bill in Chancery. *Call v. Dunning*, 4 *East*, 53.; but see *Bowles v. Langworthy*, 5 *T. R.* 366.; and the cases as to admissions, cited, *antè*, p. 2. A notice to quit (*Doe v. Durnford*, 2 *M. & S.* 62.) or a warrant to distrain (*Higgs v. Dixon*, 2 *Stark.* 180.), if attested, must be proved by calling the attesting witness.

But where the attesting witness is dead (*Anon.* 12 *Mod.* 607.), or insane (*Currie v. Child*, 3 *Camp.* 283.), or infamous (*Jones v. Mason*, 2 *Stra.* 833.), or absent in a foreign country, or not amenable to the process of the superior courts (*Prince v. Blackburn*, 2 *East*, 252.), as in Ireland (*Hodnett v. Forman*, 1 *Stark.* 90.), although he might have been examined on interrogatories (*Glubb v. Edwards*, 2 *M. & Rob.* 300.); or where he cannot be found after diligent inquiry (*Cunliffe v. Sefton*, 2 *East*, 183.); evidence of the witness's handwriting is admissible. A subscribing witness, who has become blind, ought nevertheless to be called in order to learn from him any thing material that passed at the execution. *Crank v. Frith*, 2 *M. & Rob.* 262., *per* Lord Abinger C. B. In a previous case (*Pedler v. Paige*, 1 *M. & Rob.* 258.) Park J. had admitted proof of the handwriting of a blind witness, but with some

expression of doubt, on the authority of *Wood v. Drury*, 1 *Ld. Raym.* 734.; but that case is obscurely reported, and if it be an authority for the proposition, it also shows that it would be sufficient to prove his hand, though there is another attesting witness who might have been called; which is clearly not the present practice.

With regard to the inquiry necessary to let in such evidence, it has been held that an inquiry after an attesting witness to a bond at the residence of the obligor and obligee is sufficient. *Cunliffe v. Sefton*, 2 *East*, 183. So, diligent inquiry at the witness's usual place of residence, and information there and from the witness's father, that he had absconded to avoid his creditors. *Crosby v. Percy*, 1 *Taunt.* 385. So, that on inquiry after the witness at the admiralty, it appeared by the last report that he was serving on board of some ship; *Parker v. Hoskins*, 2 *Taunt.* 223.; or that the witness went abroad twenty years ago and has never been heard of since. *Doe v. Johnson*, 1 *Phill. Ev.* 455. (n). A witness who was defendant's clerk, being subpoenaed, said he would not attend, and the trial was twice put off in consequence of his absence; search was then made at the defendant's house, and in the neighbourhood, and upon information at the defendant's that the witness was gone to Margate, inquiry was made there without success: held that, under these circumstances, evidence of his handwriting was admissible. *Burt v. Walker*, 4 *B. & A.* 697. Where diligent inquiry had been made without success for a witness, proof of his handwriting was admitted, although it appeared that a letter from him, concealing his retreat, had been received before the trial. *Morgan v. Morgan*, 9 *Bing.* 359. So where a solicitor's clerk was the witness, and the solicitor could give no account of him; although afterwards at the trial he recollected where he might probably be heard of. *Miller v. Miller*, 2 *New Ca.* 76.

The sufficiency of the enquiry is for the determination of the judge, who will found his opinion on the nature and circumstances of each case. It therefore seems of little importance to collect all the cases that have been decided upon this point. When the court is satisfied that due diligence has been used to find the witness, then it is sufficient to prove his handwriting without proving the handwriting of the party, unless with a view to establish his identity. *Nelson v. Whittall*, 1 *B. & A.* 19. *Gough v. Cecil*, *MS.* cited *Selw. N. P.* 516. (n).

Some evidence of the identity of the party to the instrument must always be given, though very slight evidence will be sufficient. It has, however, been ruled, after a review of all the previous cases, that mere identity of name is not sufficient. *Whitelocke v. Musgrove*, 1 *C. & M.* 511., *S. C.* 3 *Tyr.* 541. It seems that where the attestation states the residence of the party, proof that the party sued resided there, would be *prima facie* evidence of identity. *Id. ibid.*, and see *ant.*, p. 77. Proof that the defendant had spoken of the contents of the deed, would be sufficient evidence of identity. *Doe v. Paul*, 3 *C. & P.* 613. Where the witness to a bond stated that he saw it executed by a person who was introduced under the name of *Hawkshaw* (the name of the defendant), but could not identify him, the plaintiff was nonsuited. *Parsons v. Hawkshaw*, 2 *Stark.* 239. *Middleton v. Sandford*, 4 *Camp.* 34.

It is not sufficient ground for admitting evidence of the witness's handwriting that he is unable to attend from illness, and lies without hope of recovery. *Harrison v. Blades*, 3 *Camp.* 457. The party in-

interested in his testimony must get a judge's order to examine him out of court.

Where the witness was interested at the time of the attestation and also at the trial, it is said to be sufficient to prove the signature of the party alone; *Swire v. Bell*, 5 T. R. 371.; but in that case the execution was also proved both by the attesting witness in person, and by proof of his handwriting; so that it is of little authority as a decision on the point. If a party, knowing the witness to be interested, requests him to attest the instrument, he cannot afterwards object to his competency. *Honeywood v. Peacock*, 3 Camp. 196. Where the witness becomes interested after the attestation, a distinction is to be observed: in general, proof of the handwriting of the witness will be admitted, as where the witness becomes interested as administrator and plaintiff on the record; *Godfrey v. Norris*, 1 Stra. 34., *Cunliffe v. Sefton*, 2 East, 183.; or by marriage with one of the parties; *Buckley v. Smith*, 2 Esp. 697. So, as it seems, where a man enters into a general partnership, and thereby becomes interested in instruments which he has attested by acquiring a share in the credits, and taking upon himself the responsibilities of the firm, his handwriting may be proved. *Semb. per Cur. Horill v. Stephenson*, 5 Bing. 496. But where the plaintiff in an action on a charter-party had communicated to the attesting witness an interest in the adventure subsequently to the execution of the instrument, it was held that evidence of his handwriting was inadmissible; for the plaintiff would thereby deprive the defendant of the advantage of the witness's cross-examination by his own act. *S. C.*, *ibid.* Where the name of a fictitious person is inserted as witness; *Fasset v. Brown*, *Peake*, 23.; or where the subscribing witness denies any knowledge of the execution; *Talbot v. Hodson*, 7 Taunt. 251.; (overruling *Phipps v. Parker*, 1 Camp. 412.); *Fitzgerald v. Elsee*, 2 Camp. 635.; *Boxer v. Rabeth*, Gow. 175.; or where the attesting witness subscribes his name without the knowledge or consent of the parties; *McCraw v. Gentry*, 3 Camp. 232.; in these cases it becomes necessary to prove the instrument by calling some one acquainted with the handwriting of the party executing it; or who was present at the time of execution; or by the admission of the party to it.

Where there are two attesting witnesses, and one of them is incompetent, or his evidence cannot be obtained, the other witness must be called; and evidence of the handwriting of the former witness will not be sufficient. *Adm. in Cunliffe v. Sefton*, 2 East, 183. But where a bond is attested by two witnesses, and one of them is dead and the other beyond the reach of the process of the court; *Adam v. Kerr*, 1 B. & P. 360.; or, where one cannot be found, and the other is interested; *Cunliffe v. Sefton*, *supra*, proof of the handwriting of either seems to be sufficient.

It will not be assumed that a name subscribed to an instrument is that of an attesting witness: thus where a deed purported to be "sealed by order of the Governot and Company of the Bank, J. Knight, Secretary," it was held unnecessary to call J. Knight. *Doe v. Chambers*, 4 A. & E. 410.

Execution how proved.] In attesting a deed it is not essentially necessary that the witness should see the party sign or seal; if he sees him deliver it already signed and sealed, or sealed only, where signa-

ture is unnecessary, it will be sufficient. Thus, proof by the attesting witness that he was not present when the deed was executed, but was afterwards requested by one of several parties to sign the attestation, is sufficient evidence of the execution of the deed by such party; *Grellier v. Neale, Peake*, 146.; and witnesses may be called to prove the handwriting of the remaining parties, as to whom the deed must be considered as unattested; in which case sealing and delivery may be presumed. *Ibid.* It is not necessary for the attesting witness to prove that certain blanks in the deed were filled up at the time of execution; for this will be presumed; and the witness generally sees nothing but the signing or delivery. *England v. Roper*, 1 Stark. 304. Where a party executes a deed with a blank in it, which is afterwards filled up with his assent, in his presence, and he subsequently recognises the deed as valid, the filling up of the blank will not avoid it; for till the blank is duly supplied, it is incomplete and *in fieri*. *Hudson v. Revett*, 5 Bing. 368. *Hall v. Chandless*, 4 Bing. 123. But generally a deed executed in blank and left to be filled by another, who has no authority under seal, is void at common law; *Hibblewhite v. M. Morice*, 6 M. & W. 200.; and *Tesira v. Evans*, 1 Anstr. 228. *contra*, is not law. While the deed is still in the hands of the party executing it, another name may be inserted, and it may be re-executed without avoiding it as to the first parties, or requiring a new stamp. *Spicer v. Burgess*, 1 C. M. & R. 129. *Jones v. Jones*, 1 C. & M. 721. Where a bond was executed by the defendant, and attested by a witness in one room, and was then taken into an adjoining room, and at the request of the defendant's attorney, and in the defendant's hearing, was attested by another witness who knew the defendant's handwriting, it was held that the execution might be proved by the latter witness, the whole being considered as one entire transaction. *Parke v. Mears*, 2 B. & P. 217.; and see *Anon. Archb. Pl. & Ev.* 378. In proving the execution of a deed, the attesting witness frequently states that he does not recollect the fact of the deed being executed in his presence, but that, seeing his own signature to it, he has no doubt that he saw it executed; this has always been received as sufficient proof of the execution. *Per Bayley J., Maughan v. Hubbard*, 8 B. & C. 16.; *per Taunton J., R. v. St. Martin's, Leicester*, 2 A. & E. 213.

The sealing of the deed need not take place in the presence of the witness; it is sufficient if the party acknowledges an impression already made to be his seal. Where one partner in the presence of his co-partner executed a deed for both, but there was only one seal, and it did not appear whether the seal had been put twice upon the wax, it was held sufficient; for that no particular mode of delivery was requisite, and it was enough if a party executing a deed treated it as his own. *Ball v. Dunsterville*, 4 T. R. 313. But where a deed is executed under the authority of a power requiring it to be under the *hands and seals* of the parties, the parties must use separate seals. Thus, by stat. 8 & 9 Will. 3. c. 30., certificates are required to be under the hands and seals of the overseers and churchwardens; it was held that a certificate signed by two churchwardens and one overseer, but bearing two seals only, was not a valid certificate. *R. v. Austrey*, 1 Phill. Ev. 453., *S. C.* 6 M. & S. 319., The circumstance of a party writing his name opposite to the seal on an instrument which purports to be sealed and delivered by him, is evidence of a sealing and delivery to go to a jury.

Talbot v. Hodson, 7 Taut. 251. So when a subscribing witness is dead, proof of the handwriting of such witness is evidence of every thing on the face of the paper which imports to be sealed by the party. Per Buller J., *Adam v. Kerr*, 1 B. & P. 361.

In the delivery of a deed no particular form is necessary. Throwing down the deed upon a table with the intent that the other party shall take it up, is sufficient. *Com. Dig. Fait*, (A. 3.). Where a deed is delivered by virtue of a power of attorney, the power should be produced; *Johnson v. Mason*, 1 Esp. 89.; and proved; 1 *Phill. Ev.* p. 505. (4th ed.). In some instances a general agent has been presumed to have such authority. *Doe v. East London W. W. Company, M. & M.* 149. But, in general, the agent must be authorised by deed. *Berkeley v. Hardy*, 8 D. & R. 102. *Hibblewhite v. M^r Morine*, 6 M. & W. 200.

A condition previously expressed, though not introduced into the act of delivery, is sufficient to make the delivery of the deed as an escrow. Per Abbott C. J., *Johnson v. Baker*, 4 B. & A. 441.; and see *Murray v. Earl of Stair*, 2 B. & C. 82. Where a person delivers a deed in the presence of a witness, but retains it in his own possession, there being nothing to show that it was not intended to operate immediately, it will take effect as a deed and not as an escrow; and the delivery of a deed to a third party for the use of the person in whose favour the deed is executed, is good, though that party be not the agent of the latter. *Doe v. Knight*, 5 B. & C. 671. In a case where a debtor executed a mortgage to his creditor unknown to the latter, and kept it twelve years in his own custody till he died, the deed was held valid even against creditors from the date, in the absence of evidence to shew it was an escrow. *Eston v. Scott*, 6 Sim. 31. Where A. executes an instrument, and delivers it to B. as an escrow to be delivered to C. on a certain event, possession by C. is *prima facie* evidence against A. of the performance of the condition. *Hare v. Horton*, 5 B. & Ad. 715.

A deed executed by a marksman may be proved by a person who has seen the party make his mark, and can speak to its peculiarities. *George v. Surrey, M. & M.* 516.

[Proof and comparison of handwriting.] The result of the various cases on this head is thus stated by Mr. Justice Patteson in *Doe v. Suckermore*, 5 A. & E. 730-1., where references to all the authorities will be found. "The knowledge of handwriting may be acquired either by seeing the party write, in which case it will be stronger or weaker according to the number of times and the periods and other circumstances under which the witness has seen the party write, but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases), even if he has seen him write but once, and then merely signing his surname; or the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers producing further correspondence or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate; or by any other mode of communication between the party and the witness which, in the ordinary course of the transactions of life, induces a reasonable presumption

that the letters or documents were the handwriting of the party ; evidence of the identity of the party being of course added *aliunde*, if the witness be not personally acquainted with him." To prove the handwriting of a member of parliament, the opinion of a clerk employed to inspect franks, who never had occasion to apply to the member to verify his handwriting, has been held insufficient. *Batchelor v. Sir J. Honeywood*, 2 Esp. 714. *Cary v. Pitt, Peake, Ev. App.* 84. A witness cannot be permitted to form his opinion of the handwriting from extrinsic circumstances, as from his knowledge of the party's character and habits. *Da Costa v. Pym, Peake Ev. App.* 85.

In the case of ancient documents, where it is impossible for any witness to swear that he has seen the party write, it is sufficient if the witness has acquired his knowledge of the handwriting by the inspection of other ancient writings bearing the same signature, and preserved as authentic documents. *B. N. P.* 236. *Taylor v. Cook*, 8 Price, 652. ; and see other cases cited, *Doe v. Suckermore*, 5 A. & E. 736. Ancient writings (as a receiver's account one hundred years old) may be laid before a witness at the trial for his inspection ; and after forming a judgment of their character, his belief as to the handwriting of the document in question may be inquired into. *Doe v. Tarver*, R. & M. 143. ; and see *Roe v. Rawlings*, 7 East, 282. In these cases the question often becomes one of skill ; the character of the writing varying with the age, and the discrimination of it being assisted by antiquarian studies. *Per Coleridge J., Doe v. Suckermore, supra.*

How far and under what circumstances handwriting in modern instruments can be proved or disproved by the testimony of a witness founded on the mere comparison of different signatures is an unsettled question. In the case of *Doe v. Suckermore, supra*, the Court of King's Bench were equally divided on the question whether, after a witness had sworn to the genuineness of his signature, another witness (a bank inspector) could be called to prove that in his judgment the signature was not genuine, such judgment being solely founded on a comparison, pending the trial, with other signatures admitted to be those of the attesting witness. It is also very doubtful whether a person, practised in the examination of handwriting, can be called to state his opinion whether a writing is in a feigned or a genuine hand ; it is, however, certain that such evidence should have no weight. *Gurney v. Langlands*, 5 B. & A. 330. *Doe v. Suckermore*, 5 A. & E. 751.

Under certain circumstances the court and jury are permitted to institute a comparison between documents for the purpose of verifying handwriting, when a witness called expressly for that purpose would be rejected. Thus in *Griffith v. Williams*, 1 C. & J. 47., it was held that the rule as to the comparison of handwriting does not apply to the court or jury, who may compare two documents when they are properly in evidence. But the documents with which the handwriting is compared must be such as are in evidence for other purposes in the cause, and not put in, or selected by the party, merely for comparison. *Doe v. Newton*, 5 A. & E. 514. 534. *Griffith v. Ivery*, 11 A. & E. 323. To put such documents into the hands of the witness, merely for the purpose of shaking his credit by subsequent independent evidence contradicting his testimony as to these documents, would tend to raise collateral issues. *Hughes v. Rogers*, 8 M. & W. 123.

Proof of execution, when dispensed with.] When a deed is thirty years' old, it proves itself, and no evidence of execution is necessary; *B. N. P.* 255.; so with regard to steward's books of receipts, without proof of his hand, if they come from the proper custody; *Wynne v. Tyrwhitt*, 4 *B. & A.* 376.; private letters; *Doe v. Beynon*, 12 *A. & E.* 431.; a will produced by the officer of the Ecclesiastical Court; *Doe v. Lloyd, Peake Ev. Ap.* 91.; a bond; *Chelsea W. W. Company v. Cowper*, 1 *Esp.* 275.; and other old writings. *Fry v. Wood, Selw. N. P.* 517. (n). Even if it appear that the attesting witness is alive and capable of being produced, it is unnecessary to call him where the deed is thirty years old. *Doe v. Wolley*, 8 *B. & C.* 22.

Where an old deed is offered in evidence without proof of execution, some account ought to be given of its custody; *B. N. P.* 255.; or it should be shown that possession has accompanied it, at least where it purports to convey something which is the subject-matter of possession. *Gill. Ev.* 97. See *anté*, p. 85, 86. "*Custody of ancient Writings.*" It has, indeed, been held sufficient, on an appeal against a removal, for the respondent parish to produce a certificate thirty years old, without showing that it had been kept in the parish chest; *R. v. Ryton*, 5 *T. R.* 259.; and see *R. v. Netherthong*, 2 *M. & S.* 337.; but this seems to be at variance with principle, and with the authority of *Evans v. Rees*, 10 *A. & E.* 151., and other cases cited *anté*, p. 86. If there is any rasure or interlineation in an old deed, it ought to be proved in the regular manner by the witness if living, or by proof of his handwriting and that of the party, if dead; for in such a case it is necessary to obviate the presumption which otherwise arises against the instrument. *B. N. P.* 255. See the rule as to alterations and interlineations in bills of exchange, *post*, "*Assumpsit on Bills.*" But perhaps this is strictly necessary only where the alteration appears on the face of it material or suspicious. In documents of remote antiquity it is evidently impossible to supply such proof; and, accordingly, in such documents defects of this kind are, in practice, treated only as matter of observation to the jury, unless they are of sufficient importance to warrant the judge in excluding them altogether.

Where a party, producing a deed upon a notice, claims a beneficial interest under it, it is not necessary for the party, calling for the deed, to prove the execution of it. *Pearce v. Hooper*, 3 *Taunt.* 62. As where assignees produce the assignment of the bankrupt's effects. *Orr v. Morice*, 3 *B. & B.* 139. So in an action by a lessee against the assignee of the lease for breach of a covenant in the original lease, the plaintiff having proved a counterpart of the lease, and the defendant having put in the original, it was held unnecessary for the plaintiff to call the subscribing witness to prove the execution of it, though the defendant had assigned over the lease before action. *Burnett v. Lynch*, 5 *B. & C.* 589. So in an action against the vendor of an estate to recover a deposit on a contract for the purchase, if the defendant on notice produces the contract, the plaintiff need not prove its execution. *Bradshaw v. Bennett*, 1 *M. & Rob.* 143. And where, in ejectment, the attorney for the lessor of the plaintiff obtained from one of the defendants a subsisting lease of the premises to prevent its being set up by the defendants, it was held that this was a recognition of the lease as a valid instrument; and that, when produced in pursuance of notice from the defendants, it might be read by them without proof of

execution, though the attorney had furnished them with the names of the attesting witnesses, and though the plaintiff's title was independent of the lease. *Doe v. Heming*, 6 B. & C. 28. It is immaterial that the party calling for it denies its validity; as where the defendant produces an assignment of a bankrupt's goods which the plaintiffs (assignees of the bankrupt) impugn as fraudulent. *Carr v. Burdiss*, 1 C. M. & R. 782. Where notice was given to defendant to produce a feoffment under which he was in possession of land, the plaintiff proved by secondary evidence (the feoffment not being produced), that it had livery indorsed, and was witnessed: held that it was unnecessary, as against defendant, to call the subscribing witness, or to prove livery. *Doe v. Wainwright*, 5 A. & E. 520. In an action against a sheriff for taking insufficient pledges in replevin, the replevin bond, produced by the defendant, is admissible in evidence against him without proof of execution. *Scott v. Walthman*, 3 Stark. 169. So where the sheriff has assigned it to the plaintiff. *Barnes v. Lucas*, R. & M. 264.

Where the party producing the deed does not claim an interest under it, the party calling for it must prove it in the regular manner. *Gordon v. Secretan*, 8 East, 548. *Doe v. Marquis of Cleveland*, 9 B. & C. 864. And a party producing at the trial of a cause a deed which has been some months in his possession, is not excused from proving the execution merely because he received such deed from the adverse party, who formerly claimed a beneficial interest in it. *Vacher v. Cocks*, 1 B. & Ad. 145. As the principle of the cases is that the party, who claims an estate or interest under the instrument in his possession, impliedly affirms its due execution, the rule is inapplicable to instruments that merely testify contracts under which no permanent interest passes. Therefore, where defendant wished to shew himself to be a partner with A., under whom plaintiff sued, it was held that a contract in the plaintiff's possession to do some works for the firm, produced, on notice, by the plaintiff, must be proved by the attesting witness. *Colins v. Baynton*, 1 A. & E. N. S. 117.

A deed may be given in evidence under a rule of court or judge's order made by consent, without proof of execution. *B. N. P.* 256. So if the execution of the deed or the handwriting of the witness be one of the admissions in the cause, *antè*, p. 38. 44.; or if money has been paid into court on the count in which the deed is stated, *antè*, p. 45.; or if the party be estopped to dispute it, as by recital, *antè*, p. 47. But the estoppel is confined to the part recited; and, if the party wishes to prove more, he must produce the attesting witness in the usual way. *Gillett v. Abbott*, 7 A. & E. 783.

Where the plaintiff declared on a deed which he averred to be in the possession of the defendant, who pleaded *non est factum*; and at the trial the deed was proved to be in the hands of the defendant who had been served with notice to produce, it was held that, on the non-production of the deed, the plaintiff might give parol evidence of the contents without calling the subscribing witness, although his name was known to the plaintiff, and he was actually in court. *Cooke v. Tanswell*, 8 Taunt. 450. So in debt for double value; plea "no demand;" plaintiff, having given notice to produce, offered to prove the original demand by a copy in which an attestation had been also copied, and to shew that the original was signed by the plaintiff: held, that the production of the attesting witness (though known to the plaintiff) was

unnecessary. *Poole v. Warren*, 8 A. & E. 583. So where notice was given to produce a deed in defendant's possession, and defendant at the trial refused to do so, plaintiff was allowed to prove it by a copy without calling any attesting witness; and it was held that defendant could not put the plaintiff to a strict proof by afterwards producing the attested original. *Jackson v. Allen*, 3 Stark. 74. So where the plaintiff declared on a lost bond, and a witness stated that there were subscribing witnesses but he did not know the names, it was ruled by Lord Kenyon that the plaintiff might recover without calling them. *Keeling v. Ball*, *Peake Ev. App.* 82. But he said that "had it appeared who they were, the plaintiff must certainly have called them." *Ibid.* And it seems that when an executor shows payment of a bond under *plene administravit*, he must prove the bond in the regular way, unless perhaps where the action is on a simple contract. *B. N. P.* 143.

Deed inrolled.] Where a deed requiring inrolment by statute, as a bargain and sale, is accordingly inrolled, proof of the inrolment by an examined copy will dispense with evidence of the execution by any of the parties to the deed; *Thurle v. Madison*, *Styles*, 462.; *Smartle v. Williams*, 1 Salk. 280.; and this is expressly provided in the case of inrolled deeds pleaded by virtue of stat. 10 Ann. c. 18. s. 3. So where a deed not requiring inrolment is inrolled on the acknowledgment of one of the parties, it is evidence of execution against that party. *B. N. P.* 255, 256. But it should seem that, unless such inrolment be a record, or be rendered evidence by an act of parliament, it will not dispense with proof by a subscribing witness; as in the case of an assignment enrolled under the Bankrupt Act, 6 Geo. 4. c. 16.; *Gomersall v. Serle*, 2 Y. & J. 5.; *Giles v. Smith*, 1 C. M. & R. 470.; or of a lease of crown land inrolled in the office of the auditor of the land revenue. *Jenkins v. Biddulph*, R. & M. 339. But in *Rowe v. Brenton*, 3 M. & R. 218., such an inrolment of leases of the possessions of the Duchy of Cornwall was admitted as primary evidence. See further, *antè*, p. 74.

Proof of Wills of Land.

Production of the Will.] In order to prove a devise of lands the will itself must be produced; an exemplification, or probate of the will is not evidence, as the Spiritual Court has no power to authenticate a will *quoad* anything but personalty. *Doe v. Calvert*, 2 Camp. 389. *B. N. P.* 246. Probate is not evidence even to prove relationship in a case of pedigree; *Doe v. Ormerod*, *antè*, p. 27.; *Dike v. Polhill*, 1 Ld. Raym. 744.; but where the will is lost, the register or ledger-book of the Ecclesiastical Court, or an examined copy of it, has been admitted as evidence. *St. Legar v. Adams*, 1 Ld. Raym. 731.; *B. N. P.* 246.

What witnesses must be called.] To prove a will in a court of law it is sufficient to call one of the witnesses, if he can speak to all the requisites of attestation; *B. N. P.* 264.; *Longford v. Eyre*, 1 P. Wms. 741. But on an issue out of Chancery, all the witnesses ought to be called. *Bootle v. Blundell*, 19 Ves. 494., 1 Cooper, 136. Though this is the general rule in cases where the suit is instituted by the devisee to establish the will, yet where the suit is by the heir against the devisee for the purpose of setting aside the will, the devisee will not be re-

quired to produce all the witnesses. *Tatham v. Wright*, 2 Russ. & My. 1.

Upon the trial of an ejectment brought by the heir for the recovery of the same lands as those mentioned in the last case, one of the attesting witnesses, who proved the will on the issue out of Chancery, having died, the defendant proved his testimony from the short-hand writer's notes, which was held to be sufficient evidence of the execution of the will, though another attesting witness was present at the trial. But the previous proceedings in the Court of Chancery, upon which an issue had been directed and found for the devisee, were held not to be evidence of the execution. *Wright v. Tatham*, 1 A. & E. 8. See *anté*, p. 34.

Signing by the devisor.] By the Statute of Frauds, 29 Car. 2. c. 3. s. 5. (which is still in force as to wills made before 1st January, 1838), all devises and bequests of lands or tenements must be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions; and must be attested and subscribed, in the presence of the devisor, by three or four credible witnesses, or else shall be utterly void and of none effect.

Notwithstanding some earlier cases to the contrary, it is now the better opinion, that sealing, without signing, is not a sufficient execution within the statute. *Smith v. Evans*, 1 Wils. 313. *Wright v. Wakeford*, 17 Ves. 458. It is sufficient if the testator sign his name at the beginning of the will. *Lemayne v. Stanley*, 3 Lev. 1., S. C. 1 Freem. 538. If the will is written on several sheets, and the testator signs some and intends to sign the rest, but does not, this is not a sufficient execution; *Right v. Price*, 1 Doug. 241.; but where a will, written on three sides of a sheet of paper, concluded by stating that the testator had signed his name to the first two sides, and had put his hand and seal to the last, and in fact he had put his hand and seal to the last, but had omitted to sign the two other sides, the execution was held good, the signing of the last sheet showing that the former intention had been abandoned. *Winsor v. Pratt*, 2 B. & B. 650. Where a codicil was duly executed and attested by three witnesses, and written on the same paper with an unexecuted will to which it expressly referred, it was held that such execution gave effect to the will, and that it thereby became a good will of lands. *Doe v. Evans*, 1 C. & M. 42., S. C. 3 Tyr. 56. But a codicil may operate as a partial re-publication only. *Monypenny v. Bristow*, 2 Russ. & My. 117. Where the testator is blind, it is not necessary to read over the will in the presence of the attesting witnesses previously to execution. *Longchamp v. Fish*, 2 N. R. 415.

Attestation.] The statute 29 Car. 2. c. 3. does not direct that the witnesses shall see the testator sign; therefore it is sufficient if the testator acknowledge to the witnesses, either separately or all together, that the will or the handwriting is his. *Stonehouse v. Evelyn*, 3 P. Wms. 254.; *Johnson v. Johnson*, 1 C. & M. 140. But where the attestation purported that the will had been signed in the presence of the three witnesses who, in his presence, and that of each other, signed the attestation, it was held insufficient to call one of them who stated that he and another saw the testator sign, but that the third, whose signature was proved, was not then present. *Doe v. Lewis*, 7 C. & P. 574. It is

sufficient though the witnesses do not know the paper to be the testator's will. *Wright v. Wright*, 7 Bing. 457. If the witnesses set their marks to the will it is a sufficient attestation; *Harrison v. Harrison*, 8 Ves. 185.; and they may attest it at several times; *Cook v. Parson*, *Pres. in Chanc.* 185.; but in that case one witness alone will not be able to prove the due execution of the will. The witnesses need not attest every page, but all the will should be in the room at the time of attestation; whether it was so or not is a question for the jury. *Bond v. Senwell*, 3 Burr. 1773.; *Lea v. Libb*, 3 Mod. 262. The witnesses must attest and subscribe the will in the presence of the testator; but it is enough if the testator was in such a position that he might see the witnesses attest, as where he was in one room and the witnesses in another, and he might have seen them through a window. *Shires v. Glascock*, 2 Salk. 688. So where the testator was in bed, and the witnesses retired through a small passage into another room, and attested the will on a table opposite to the door, which was open, as well as the door of the testator's room. *Davy v. Smith*, 3 Salk. 395.; *Todd v. Lord Winchelsea*, M. & M. 12. So where the testatrix sat in her carriage opposite the window of the attorney's office in which the will was attested. *Casson v. Dade*, 1 Br. C. C. 99. But where the will was attested in an adjoining room, and the jury found that in one part of the room in which the testator was, a person inclining forward, with his head out of the door, might have seen the witness, but that the testator was not in such a situation, the execution was held invalid. *Doe v. Manifold*, 1 M. & S. 294.

Proof where the witnesses are dead, or deny their attestation.] Where the witnesses are dead, their handwriting should be proved; and though the attestation does not express that the witnesses subscribed the will in the presence of the testator, yet a jury may presume that fact in favour of the will. *Croft v. Pawlet*, 2 Stra. 1109.; *Hands v. James*, Com. 531. And it seems that a general form of attestation must be taken as affirming that all has been done in the presence of the witnesses which is stated in the body of the instrument. *Buller v. Burt*, coram Leach M. R. cited 4 A. & E. 16. Even though all the witnesses to a will should swear that the will was not duly executed, evidence may be adduced in support of the will. *Lowe v. Jolliffe*, 1 W. Bl. 365. Where two of the witnesses are dead, and the surviving witness charges them with fraud in the attestation of the will, evidence of their good character is admissible. *Doe v. Walker*, 4 Esp. 50.; *Provis v. Reed*, 5 Bing. 435.

Proof of wills thirty years old.] In a court of law, a will thirty years old, if the possession has gone under it (and sometimes without the possession), and the signing is sufficiently recorded, proves itself; but, if the signing is not sufficiently recorded, it is a question whether the age alone proves its validity; and then possession under the will, and claiming and dealing with the property as if it had passed under the will, is cogent evidence to prove the duly signing. *Per Lord Eldon C., Lord Ranciffe v. Parkyns*, 6 Dow. Parl. Rep. 202.; and see *Doe v. Lloyd*, *Peake Ev. App.* 91. The thirty years should be computed from the date of the will, and not from the death of the testator. *McKenire v. Fraser*, 9 Ves. 5.; *Doe v. Wolley*, 8 B. & C. 22. Such a will proves itself, though some

of the witnesses should be still living. *S. C. 8 B. & C. 22.*; and *Doe v. Burdett*, 4 A. & E. 1.

Interested attesting witness.] By stat. 25 Geo. 2. c. 6. s. 1. if any person shall attest the execution of any will or codicil, to whom any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate, other than and except charges on lands, tenements, or hereditaments for payment of debts, shall be thereby given or made, such devise, &c. shall, so far only as concerns such person attesting the execution of such will, &c., or any other person claiming under him, be void, and such person shall be admitted a witness to the execution.

It has been held by the Master of the Rolls, in *Emanuel v. Constable*, 3 Russ. 436., and by Sir John Nicholl, in *Brett v. Brett*, 3 Addams, 210. (affirmed by the delegates), that this clause does not extend to wills of personal estate; and that a legacy to a person, who is attesting witness to such a will, is therefore not void. A contrary doctrine was held by Sir W. Grant. *Lees v. Summersgill*, 17 Ves. 508. See *Doe v. Mills*, 1 M. & Rob. 292.

By sec. 2., if a creditor of the deviser, whose will is charged with payment of the debt, attests the will, he shall be admitted as a witness. But where the attesting witness is the husband of a devisee, who takes an estate in fee in remainder under the will, he is not made competent by the statute. *Hatfield v. Thorp*, 5 B. & A. 589. The statute avoids a devise to an attesting witness, though there are three other attesting witnesses. *Doe v. Mills*, 1 M. & Rob. 288.

Under the act 1 Vic. c. 26. s. 14., if the attesting witness to a will be incompetent to prove it at the time of execution or afterwards, the will shall not be invalid on that account: and by sec. 15., if the attesting witness, or the wife or husband of the witness, be a beneficial devisee, &c., the devise shall be void, and the witness competent: and by sec. 16., in the case of a will charging real or personal estate with debts, a creditor, or the wife or husband of one, may attest the will, and prove its execution: and by sec. 17., the executor is admissible to prove the execution, or the validity or invalidity, of a will.

Act for the amendment of the law of wills.] Stat. 1 Vic. c. 26. extends to real and personal property of all kinds, and to wills, codicils, and appointments made, re-executed, re-published, or revived, on or after 1st of January, 1838; but not to estates *per autre vie* of any person who died before that day. It provides, by sec. 9., that no will shall be valid unless it be in writing, and shall be signed *at the foot or end thereof* by the testator or some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses *present at the same time*; and such witnesses shall attest and subscribe the will in the presence of the testator; but no form of attestation shall be necessary. By sec. 13. every will so executed shall be valid without any other publication thereof. (*Doe v. Burdett*, 4 A. & E. 1.) Similar formalities are required in revoking, altering, or reviving wills. See further, *post*, "*Ejectment by Devisee.*"

Proof of Execution of Powers.

As a general rule, all the circumstances required by the creator of a power, however otherwise unimportant, must be observed, and cannot be satisfied but by a strict and literal performance. *Per* Lord Ellenborough C. J., *Hawkins v. Kemp*, 3 East, 440. And when the power directs attestation and other formalities, the attestation must notice the compliance with the formalities. Thus, where it was to be executed "by any deed or writing under the hands and seals of the parties, to be by them duly executed in the presence of, and attested by two or more witnesses," it was held, that as the attestation stated only a sealing and delivery, and omitted the signing, the power was not duly executed; *Doe v. Peach*, 2 M. & S. 576.; and a subsequent correct attestation, indorsed upon the instrument after the death of one of the parties, would not remedy the defect. *Ibid.* *Wright v. Wakeford*, 4 Taunt. 214. So if the power is to be executed by an appointment to be signed and published in the presence of, and attested by two witnesses, and the attestation omits to mention the publication. *Moodie v. Reid*, 7 Taunt. 355. But where the attestation mentioned "delivery," this has been held equivalent to publication. *Ward v. Swift*, 1 C. & M. 171. It was decided by the Court of Q. B., after reviewing the cases, that where the various prescribed forms purport on the face of the will to have been complied with, a general attestation in the form "witnesses A. B. C." will be sufficient, provided the forms have, in fact, been observed: but that where several things are required to be done, which are only partially noticed in the attestation, the execution is then defective, on the principle that *expressio unius est exclusio alterius*. *Doe v. Burdett*, 4 A. & E. 1. 10. This distinction, however, was questioned, and the decision reversed, upon error in the Exchequer Chamber. 9 A. & E. 936. Where the attestation was defective by omitting to notice the signing, it was held that it could not be supplied by evidence that the witness did, in fact, see the party sign, &c. as well as seal. *Doe v. Peach*, 2 M. & S. 576. When the instrument creating the power does not require attestation, an informal or imperfect one will not invalidate. 1 Sugd. Pow. 304. 327. (6th ed.). The defect of omitting to state in the attestation the signing of the instrument is cured by stat. 54 G. 3. c. 168., with regard to powers theretofore executed; but the act is only retrospective.

The late act, 1 Vic. c. 26., on wills, has in future abrogated the formalities prescribed by the donor of a power to be exercised by a will, or appointment in the nature of a will; for it provides (sec. 10.) that "no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity." Hence the execution of wills in virtue of powers must hereafter conform to the regulations pointed out in the 9th section of the act, *ante*, p. 98.

Proof of Awards.

In a proceeding to enforce an award it is necessary to prove as well the submission of all parties to arbitration as the execution of the award; for without proof of the submission it does not appear that the arbitrator had competent authority to decide the question between the parties. *Ferrer v. Owen*, 7 B. & C. 427.; and see *Brazier v. Jones*, 8 B. & C. 124. If the submission was to two arbitrators named, and to a third person to be appointed by them, the appointment of such third person must be duly proved. A recital of such appointment in the award, signed by the three, will not be sufficient; nor will it be enough to show that the third person acted with the other arbitrators, and signed the award. *Still v. Halford*, 4 Camp. 19.

As to proof of awards by commissioners under inclosure acts, &c., it is provided by the general act, 41 G. 3. c. 109. s. 35.; and also by 3 & 4 W. 4. c. 87. ss. 2. and 4., that either the original award, or a copy of the enrolment signed by the proper officer of the court, or the clerk of the peace or his deputy, and purporting to be a true copy, shall be admitted in all courts as legal evidence. Such an award requires only an award stamp, and not a conveyance stamp, though it may operate as such. *Doe v. Preston*, 7 B. & C. 392. In any collateral proceeding in which it may be necessary to give it in evidence, it will be presumed that the award has been regularly made, and that the commissioners were duly qualified, and had given the proper notices, &c.: but this presumption may be rebutted; *R. v. Haslingfield*, 2 M. & S. 559.; *Doe v. Gore*, 2 M. & W. 320.; and excess of authority may be shewn. *Wingfield v. Tharp*, 10 B. & C. 785. But awards made under the first of the above acts, or under stat. 3 & 4 Vict. c. 31., are, by the last act, made conclusive evidence of a compliance with all the provisions of those acts, and of all necessary consents; and no other evidence of title under the inclosure shall be requisite. Sect. 1.

PROOF BY WITNESSES.
Attendance of Witnesses.

Subpœna, service of.—Expenses.] The process to compel the attendance of witnesses is the writ of *subpœna ad testificandum*. Either the writ, or a copy of it, must be personally served on the witnesses; and where a copy only is delivered, the original must be shewn, whether the witness require it or not; otherwise he cannot be attached. *Wadsworth v. Marshall*, 1 C. & M. 87. It must be served a reasonable time before the trial, so as to give witnesses "reasonable time to put their affairs in such order that their attendance may be as little prejudice to themselves as possible." *Hammond v. Stewart*, 1 Stra. 510. Therefore, notice to a witness in London at two in the afternoon, requiring him to attend the sittings at Westminster in the course of the same evening, is too short. *Ibid.* But where a person is present or attending near the court, service even on the day of trial may be sufficient under the circumstances. *Mausell v. Ainsworth*, 8 Dowl. P. C. 869. Whether the service be sufficient is for the judge, not the jury. *Barber v. Wood*, 2 M. & Rob. 172. If the cause be made a *remanet*, the subpœna must

be re-sealed and re-served. *Sydenham v. Rand*, 3 *Doug.* 429. The witness in a civil suit is not bound to attend, unless the reasonable expenses of going to and returning from the place of trial, and of his stay there, are tendered to him at the time of serving the *subpœna*; nor, if he appears, is he bound to give evidence before such expenses are paid or tendered. *Chapman v. Paynton*, 13 *East*, 16 (π). The reasonableness depends on the situation and circumstances of the witness; *Dixon v. Lee*, 1 *C. M. & R.* 645; and see *Vice v. Anson*, *M. & M.* 96; and where a witness has already been paid by one side, this may be taken into account when he is subpoenaed by the other side. *Betteley v. McLeod*, 3 *New Ca.* 405. Within the bills of mortality, the usual tender is 1s. in a town cause. *Tidd*, 856. Where a witness has come to and staid at the assizes on *subpœna* without requiring payments, he may refuse to appear till payment of the expense of returning is made. *Newton v. Harland*, 1 *M. & G.* 956. But no tender of compensation for loss of time is necessary, though it is the practice to allow it in costs in some cases; *Collins v. Godefroy*, 1 *B. & Ad.* 950. The expenses of witnesses examined upon interrogatories under 1 *W. 4. c. 22.*, and attending before arbitrators under 3 & 4 *W. 4. c. 42.*, are respectively provided for by those acts.

Before the jury are sworn, the counsel of the party may have an absent witness called on his *subpœna*. *Hopper v. Smith*, *M. & M.* 115. This course, when adopted by the plaintiff, avoids the additional expense of a nonsuit. *Mullett v. Hunt*, 1 *C. & M.* 752. But it is not absolutely necessary to call a witness on his *subpœna*, in order to entitle the party to proceed against him. *Lamont v. Crook*, 6 *M. & W.* 615.

Habeas corpus.] If the witness is in custody, his attendance must be procured by a writ of *habeas corpus ad testificandum*. *Tidd*, 858. By stat. 44 *G. 3. c. 102.*, a judge of the superior courts, and of the county palatine of Chester, may award a writ of *habeas corpus* to bring up a prisoner from any gaol or prison in the United Kingdom, for the purpose of giving evidence in any court of record in England. *Habeas corpus* also lies to bring a witness from a lunatic asylum, on an affidavit that he is fit for examination and not dangerous. *Fennell v. Tait*, 1 *C. M. & R.* 584.

Protection from arrest.] During the time consumed by a witness in going to the place of trial, in his attendance there, and in his return, he is protected from arrest; even though he has consented to attend without a *subpœna*. *Arding v. Flower*, 8 *T. R.* 536.

Absence of material witness.] In some cases an application may be made to put off the trial on account of the absence of a material witness. An application to put off the trial beyond the existing sittings, or from sittings to sittings, is not generally allowed on the part of the plaintiff; for he may any time withdraw the record if he is not prepared to try. But where, from the sudden indisposition of a witness who may be able to attend in the course of a day or two, or for other temporary reason, the plaintiff is prevented from trying his cause in its order in the paper, yet has ground to believe he shall be able to try it before the sittings are over, a judge *ad nisi prius* will make an order for the trial to stand over till the witness is likely to attend.

Per Lord Ellenborough, *Ansley v. Birch*, 3 *Camp.* 333. And a similar order will be made if it appears that the absence of the witness is owing to the conduct of the defendant's attorney. *Turquand v. Dawson*; 1 *C. M. & R.* 709. Where a motion is about to be made to a judge *at nisi prius* for putting off the trial on account of the absence of a witness, notice should first be given to the opposite attorney with a copy of the intended affidavit. 1 *Phill. Ev.* 16. Where expenses have been incurred by the other party in bringing up witnesses, the application will only be granted on the terms of paying them. No affidavit of merits is required. *Att. Gen. v. Hull*, 2 *Dowl. P. C.* 111.; *Hill v. Prosser*, 3 *Id.* 704. The affidavit may be made by the defendant, or by his attorney; *Duberly v. Gunning, Peake*, 97.; or by the attorney's clerk, if he has the management of the cause. *Sullivan v. Magill*, 1 *H. Bl.* 637.

Production of instruments under subpoena duces tecum.] A witness served with a *subpoena duces* is bound to bring into court any instrument proved to be in his possession, though he may have a valid excuse for not shewing it in evidence; and the validity of the excuse is matter for the judgment of the court, and not of the witness. *Amey v. Long*, 9 *East*, 473. But where the witness declined to produce an instrument on the ground of professional confidence, Lord Denman C. J. refused to inspect it to see whether it was one which he ought to withhold. *Doe v. James*, 2 *M. & Rob.* 47. The witness is not entitled to have his liability to produce, argued by counsel. *Doe v. Lord Egremont*, 2 *Id.* 386. The court will excuse production if the disclosure would subject the party to a criminal charge or penalty; *Whitaker v. Izod*, 2 *Taunt.* 115.; or involve a breach of professional confidence; as where an attorney produces a deed which may prejudice the title of a third person, his client; *Harris v. Hill*, 3 *Stark.* 140.; or where the solicitor to a commission of bankrupt produces the proceedings under it, which the judge in his discretion thinks likely to prejudice the assignees. *Corsen v. Dubois, Holt, N. P.* 239. *Acc. Laing v. Barclay*, 3 *Stark.* 38. *Batson v. Hartsink*, 4 *Esp.* 43. But the production of them by the solicitor, in an action *inter alios*, was enforced by Lord Ellenborough, as being a "public duty." *Pearson v. Fletcher*, 5 *Esp.* 90. And in an action by a third person against a bankrupt, the plaintiff may call on the solicitor of the assignees to produce the bankrupt's books. *Hawkins v. Howard, R. & M.* 64. Where a creditor of the bankrupt sued the defendant for not taking proper steps to get his debt proved, Holroyd J. held that the plaintiff might compel the production of the commission. *Cohen v. Templar*, 2 *Stark.* 280. On the whole, the law respecting the production of the proceedings in bankruptcy by the solicitor of the assignees does not appear to have been very clearly settled, and is no longer likely to come in question, in consequence of the facility given for proof of the proceedings by stat. 6 *G. 4. c. 16. s. 96, 97.*, as amended by 2 & 3 *W. 4. c. 114.* See *post*, tit. "*Actions by Assignees*," &c.

Neither a party, nor his attorney, will be compelled to produce his title deeds. *Pickering v. Noyes*, 1 *B. & C.* 263. So defendant cannot compel the production of deeds of the plaintiff, by serving a subpoena on his steward in whose possession they are; for his possession is that of his employer; *Ld. Falmouth v. Moss*, 11 *Price*, 455.; nor can a clerk

in a public office be compelled to bring official papers without leave of the principal. *Austin v. Evans*, 2 M. & G. 430. In trespass *de bonis, &c.* the defendant's agent will not, it is said, be obliged to shew the written authority under which he took the goods. *Miles v. Dawson*, Peake Add. Ca. 56. An attorney will not be obliged by subpoena to disclose a deed of the defendant, his client, though he has been improperly compelled by commissioners of bankrupt (under whom the plaintiffs claim) to undertake to produce it. *Nixon v. Mayo*, 1 M. & Rob. 76. In a case in which the attorney and steward of the lord of a borough was subpoenaed to produce certain presentments and precepts touching the appointment of officers in the borough, and also a case and opinion of counsel on the same subject taken by the predecessor of the witness on behalf of a former lord, Lord Denman C. J. held that he was bound to produce the presentments, &c., as being of a public nature, but not the case. *R. v. Woodley*, 1 M. & Rob. 390., and from MS. notes.

A person merely subpoenaed to produce, and not to testify, need not be sworn. *Perry v. Gibson*, 1 A. & E. 48. And if sworn by mistake, he is not liable to cross-examination. *Rush v. Smith*, 1 C. M. & R. 94. When the production is excused, parol proof is admissible. *Marston v. Downes*, 1 A. & E. 31.

Competency of Witnesses.

Question of competency, by whom decided.] It is for the court to decide upon the competency of witnesses; and for the jury to determine their credibility. It is the province of the former to judge whether there be any evidence; of the latter whether there be sufficient evidence. *Per Buller J., Carpenter's Company v. Hayward*, 1 Doug. 375. And wherever the admissibility of a witness depends on a disputed fact, the decision of that fact is for the judge. *Wright v. Tatham*, 7 A. & E. 356. On such a collateral issue, he is judge both of law and fact, subject to the review of the court above, who will uphold his opinion where the evidence of disqualification is ambiguous and the testimony was admitted. *Doe v. Webster*, 12 A. & E. 442. *Shipton v. Thornton*, 9 A. & E. 314, 327.

Judges and Jurors.

A person, whose name is in the commission, may be examined as a witness; so may a juror. *Bac. Abr. Evid. A. 2., 5 Black. Com. 375.*

Incompetency from Want of Understanding.

Insane persons, idiots, and lunatics during their lunacy, are incompetent witnesses. But lunatics, in their lucid intervals, are said to be competent. *Com. Dig. Testm. (A. 1.)* A person born deaf and dumb may, if he has sufficient understanding, give evidence by signs through an interpreter; *Ruston's case*, 1 Leach, C. C. 455., 3d edition; or by writing; *per Best C. J., Morrison v. Lennard*, 3 C. & P. 127. Children, not able to comprehend the moral obligation of an oath, cannot be examined; *Com. Dig. ubi sup. B. N. P. 293.*; and a child wholly destitute of religious education cannot be made a competent witness by being superficially tutored just before the trial with a view to qualify her; *per Patterson J., R. v. Williams*, 7 C. & P. 320.; but tender age alone is

no objection. *Brazier's case*, 1 East, P. C. 443. Where a child, or other person of defective understanding, is tendered as a witness, the practice is for the judge to examine him with a view to ascertain his competency.

Where the child cannot be sworn, the account, which it has given of the transaction to others, is of course inadmissible. *R. v. Tucker*, 1 Phill. Ev. 19.

Incompetency from Want of Religious Principle.

Atheists, and such infidels as profess no religion that can bind their consciences to speak the truth, are excluded from being witnesses. *B. N. P.* 292. *Omichund v. Barker*, Willes, 549. But infidels, as Gentoos, who believe in a God, the avenger of falsehood, are received as witnesses. *Id. ibid.* All persons ought to be sworn according to the ceremonies of their religion. *Id.* 547. *Atcheson v. Everitt*, Cowp. 390. Jews on the Pentateuch. *Id.* Mahometans on the Koran. *Morgan's case*, 1 Leach, C. C. 64. So a witness who declines swearing on the New Testament, though he professes Christianity, may be allowed to swear on the Old Testament, if he considers that mode binding on his conscience. *Edmonds v. Rowe*, R. & M. 77. The proper time for asking the witness whether the form of administering the oath is binding on his conscience is previous to its administration. But if the oath is administered in the legal form before the attention of the court or the counsel is directed to it, the question may be properly asked afterwards. If the witness should reply that he considers the oath taken to be binding on his conscience, it would be irrelevant to ask further whether there be any other mode of swearing more binding than that used. *The Queen's case*, 2 B. & B. 284.

The proper mode of examining a witness, for the purpose of trying his competency in religious principle, is not to question him as to his particular opinions, but whether he believes in God, the obligation of an oath, and a future state of rewards and punishments; *per* Buller J., *R. v. Taylor, Peake*, 11.; and it seems sufficient if he states that he believes in a God who will reward or punish him in *this* world. *Omichund v. Barker*, *supra*.

By statutes 3 & 4 W. 4. c. 49. & c. 82., an affirmation by Quakers, Moravians, and Separatists has the same effect as an oath in all cases civil and criminal, provided the affirmations be made in the forms pointed out in those two acts respectively.

Incompetency from Infamy.

Persons convicted of treason, felony, or any species of the *crimen falsi*, as for forgery, perjury, subornation of perjury, &c., are incompetent to be witnesses. *Com. Dig. Testm.* (A. 3-4). *Co. Litt.* 6 b. So a conviction for bribing a witness to absent himself; *Clancey's case*, Fort. 209.; barratry; *R. v. Ford*, 2 Salk. 690.; conspiracy at the suit of the king, that is, a conspiracy to accuse another of a capital offence, *Co. Litt.* 6 b., will render a witness incompetent. A conviction for conspiring to raise the funds by false rumours does not render the party incompetent; *Crowther v. Hopwood*, 3 Stark. 21.; *acc. per* Lord Stowell; *Ville de Varsovie*, 2 Dods. 174.; but in *Bushel v. Barrett*, R. & M. 34., it was held by Gaselee J., after consulting with Littledale J., that a judg-

ment for a conspiracy to bribe a person (summoned as a witness on an information on the revenue laws) not to appear, renders the person convicted incompetent as a witness. A conviction for keeping a gambling-house does not disqualify; *R. v. Grant, R. & M.* 870.; but a person, convicted of winning by fraud or ill practice at certain games, seems rendered incompetent by stat. 9 Anne, c. 14. s. 6., which enacts that he shall be deemed infamous. Outlawry in a personal action does not render the party incompetent. *Co. Litt.* 6 b. But it is otherwise of outlawry for treason or felony. 3 *Inst.* 212. It is not the punishment, but the conviction for the offence, which causes the infamy. *B. N. P.* 292. *R. v. Ford, 2 Salk.* 690.

Proof of judgment.] In order to establish the incompetency of the witness on the ground of infamy, the judgment must be proved in the usual way; *R. v. Castell Careinion, 8 East,* 78.; that is, by an examined copy of the record of conviction, with proof of the identity of the party. An admission by the witness himself, that he is confined under such judgment, is not sufficient to render him incompetent, however it may affect his credit. *Ibid.*

Competency of infamous witnesses, how restored.] In general, the competency of a person, rendered incompetent by a conviction, is restored by pardon. *Com. Dig. Testm.* (A. 3-4). Where the pardon is conditional, the performance of the condition must be proved. *Hawk. P. C. b. 2. c. 37. s. 45.* But where a man has been sentenced to transportation and confined in the hulks for the term, and discharged at the end of it, it will not destroy the effect of the pardon that he has escaped twice for a few hours each time. *R. v. Badcock, R. & R. C. C.* 248. Where a man is convicted of perjury at common law, his capacity is restored by pardon; but on a conviction for perjury, or subornation of perjury, under the statute 5 Eliz. c. 9., the king's pardon will not restore the competency of the offender, because the act is construed to have taken away the power of the crown. *B. N. P.* 292. But see 2 *Harg. Jurid. Arg.* 221. And by statute 7 & 8 G. 4. c. 28. s. 13., where the king's majesty shall be pleased to extend his royal mercy to any offender convicted of any felony punishable with death or otherwise, and by warrant under his royal sign manual, countersigned by one of his principal secretaries of state, shall grant to such offender either a free or a conditional pardon, the discharge of such offender out of custody in the case of a free pardon, and the performance of the condition in case of a conditional pardon, shall have the effect of a pardon under the Great seal, as to the felony for which such pardon shall be so granted. And by statute 9 G. 4. c. 32. s. 3., where any offender has been convicted of any felony not punishable with death, and has endured the punishment to which such offender has been adjudged, the punishment so endured shall have the like effects and consequences as a pardon under the Great seal, as to the felony whereof he was so convicted. By section 4. (reciting that there are certain misdemeanors which render the parties convicted thereof incompetent witnesses), where any offender has been convicted of any such misdemeanor (except perjury or subornation of perjury), and has endured the punishment to which such offender has been adjudged for the same, every such offender shall not, after the punishment so endured, be deemed to be,

by reason of such misdemeanor, an incompetent witness in any court or proceeding civil or criminal.

Incompetency from Interest.

A direct interest to the smallest amount in any person will prevent him from being examined as a witness. The ground of this objection has been thus stated by a learned judge :—" The rule stands upon this principle, that if the party declines releasing his interest, whatever may be its amount, it seems that he feels it of importance to him, and therefore cannot be trusted as a witness in a suit instituted for the recovery of it. A feeling of interest will, in spite of the utmost efforts of the most conscientious man, often so warp his memory, as to prevent him from giving an accurate account of any transaction in which he is concerned. It is true that prejudices will often influence the mind of a witness as much as interest, but this is an evil that cannot be remedied. If we want the testimony of witnesses, we must be content to take it with all the defects that the infirmities of those who give it, may occasion. We may require a witness to release his interest, but we cannot compel him to release himself from his prejudices. Because we cannot do all we wish, we should not fail to do all we can, to get at truth." *Per Best C.J., Hovill v. Stephenson, 5 Bing. 497.*

Objection, when and how taken.] The old practice was to require that the incompetency of a witness should be shown, either by independent evidence or on the *voire dire*, before he was examined in chief ; and the party objecting might take either method at election ; but not both. *Q. v. Muscot, 10 Mod. 193. Turner v. Pearte, 1 T. R. 719.* But the objection may now be taken at any time while the witness is under examination ; *id. ibid.* ; and *Abrahams v. Bunn, 4 Burr. 2258.* ; although he has denied his interest on the *voire dire*. *Moore v. Howell, 12 Vin. 49.* But when the witness has been examined and cross-examined, it is doubtful whether any objection can, afterwards and during the trial, be made to his competency : that it is then too late, see *Beeching v. Gower, Holt, N. P. 314.*, and *Ogle v. Paleski, ibid. 485.* ; *Abrahams v. Bunn, supra* ; that it is never too late, see *Stone v. Blackburn, 1 Esp. 37.* ; *Turner v. Pearte, supra* ; and *per Gibbs C.J., Morish v. Foote, 8 Taunt. 458.* Where the objection is apparent, and the opposite party has permitted the examination to proceed, no doubt the court would not afterwards allow him to insist upon the incompetency, because the testimony turns out unfavourable ; and even where the incompetency of the witness was unknown during examination, it seems to be the later and better opinion that his discharge from the box precludes any further objection. *Fellingham v. Sparrow, 9 Dougl. P. C. 141.* ; *Deudney v. Palmer, 4 M. & W. 664.* It was doubted in a late case whether a judge can exclude the testimony of a witness whose interest was denied on the *voire dire*, but appeared, incidentally, from other evidence in the cause. *Doe v. Pearce, 5 M. & W. 506. 508.* In equity, an objection of this kind is not considered as waived by cross examination ; nor unless known, or presumed to be known, to the party examining. *Moortouse v. De Passow, 19 Ves. 433.* ; *Vaughan v. Worral, 2 Swanst. 400.*

Where the witness is examined on the *voire dire*, he may be asked as to the contents of a written instrument without a notice to produce it ; though if the witness produces the instrument on which the objection

is founded, it ought to be read. *Butler v. Carver*, 2 Stark. 434. But where the objection is made on cross-examination, and not on the *voire dire*, a writing must be proved in the regular way. *Howell v. Lock*, 2 Camp. 14. The objection of interest may be removed in the same manner in which it is raised; and therefore, where the witness was objected to on the *voire dire* as next of kin in an action by an administrator, but on re-examination stated that he had released his interest, the objection was held to be removed. *Ingram v. Dale*, 1 Phill. Ev. 124. *Botham v. Swingler*, 1 Esp. 164.; *S. C. Peake*, 218. He may be cross-examined as to the validity of the release; thus a corporator, who states on *voire dire* that he has been disfranchised, may be questioned, and books referred to by him may be inspected, to impeach the regularity of the disfranchisement. *Godmanchester v. Phillips*, 4 A. & E. 550. If the objection is not raised out of the mouth of the witness, it must be answered by facts proved in the ordinary way. *Botham v. Swingler*, *supra*; *Corking v. Jarrard*, 1 Camp. 37. And in an action by assignees of a bankrupt where the bankrupt was called, and it appeared by the pleadings that he was the bankrupt and so interested, it was considered necessary to restore his competency by proving his certificate and release. *Goodhay v. Hendry*, M. & M. 319.; *semb. Acc. Anon. Cor. Tindal C. J.*, *Id.* 321. But in a later case of *Lunniss v. Row*, 10 A. & E. 606., the appearance of the witness's interest on the face of the pleading was held unimportant, and he was permitted to prove a release on the *voire dire* by parol: and *per Littledale J.*, "He knows nothing about the record, and cannot be presumed to have had notice of the objection that would be made to his testimony." A witness, who appears *prima facie* interested by the evidence of a previous witness, may be examined on the *voire dire* by the party who calls him. *Hartshorne v. Watson*, 5 New Ca. 477. Where a bankrupt, called as a witness, stated on the *voire dire* that he had obtained his certificate and released his assignees, Parke J. held him competent without the production of the release. *Carlisle v. Eady*, 1 C. & P. 234.; and see *Wandless v. Cusothorne*, M. & M. 321.

Time of acquiring the interest.] It has been held that a witness cannot, by making a wager on the point in question, render himself incompetent, and thus deprive the party of his testimony; *Barlow v. Vowell*, 5 Sim. 586.; and that where a person makes himself a party in interest after a plaintiff or defendant has an interest in his testimony, he cannot by this deprive the plaintiff or defendant of his testimony. *Per Grose J.*, *Bent v. Baker*, 3 T. R. 27. This doctrine, however, has been since qualified, and it is held, that though a person who is the agent of both parties in the transaction, or who has been chosen as the attesting witness of it, cannot afterwards disqualify himself by voluntarily acquiring an interest in it for the purpose of taking off his testimony; yet, on the other hand, the pendency of a suit cannot prevent third persons from transacting business *bona fide* with one of the parties; and if an interest in the event of the suit is thereby acquired, the general consequence of law must follow, that the person so interested cannot be examined as a witness for that party, from whose success he will necessarily derive an advantage. *Forrester v. Pigou*, 3 Camp. 380.; *S. C.* 1 M. & S. 9. Therefore where a plaintiff suing on a charter-party has communicated an interest in the adventure to an attesting

witness, the latter can neither be called in behalf of the plaintiff, nor can his handwriting be proved. *Hovill v. Stephenson*, 5 Bing. 493. But where, subsequently to the execution of the instrument, the witness becomes interested by operation of law, as by becoming executor or administrator, or by marriage, we have seen that evidence of his handwriting is admissible. *Vide ante*, p. 89.

What is such an interest as excludes.] The law regards a person as interested where there is a definite benefit or disadvantage to the witness attending the result of the cause one way. This arises in two cases: first, where he has a direct, certain, and immediate benefit from the event of the cause; secondly, where the verdict in the cause may be given in evidence on any future occasion in support of, or against, his own interest. *Smith v. Prager*, 7 T. R. 62.; *Doe v. Tyler*, 6 Bing. 394.

There are various instances in which a witness is said to be excluded on the ground of his direct interest in the event of the suit. Thus, a residuary legatee is incompetent for the plaintiff in an action brought by the executor to recover a debt due to the testator. *Baker v. Tyrokhitt*, 4 Camp. 27. So in ejectment the landlord cannot prove the title of the defendant, his tenant; nor can the tenant in possession defend the title of his landlord; and where the plaintiff has made out a *prima facie* case, a witness, who states that he is himself the real tenant, is incompetent for the defendant, since he would be turned out under a judgment for the plaintiff. *Doe v. Wilde*, 5 Taunt. 183.; and Tindal C. J. in *Doe v. Tyler*, 6 Bing. 394. A remainder-man is incompetent to establish the preceding particular estate tail, though he is of very advanced age, and there are issue in tail before him. *Doe v. Tyler, supra*. In trespass, the defendant justified a distress on A. as his tenant; plaintiff, under the replication *non tenuit*, alleged that A. was seised in fee and demised to plaintiff; held that A.'s wife was not competent for the plaintiff; for if defendant succeeded, A. would have to indemnify the plaintiff; and the incompetency, being independent of any use made of the verdict, was not removed by 3 & 4 W. 4. c. 42. s. 26. *Wedge-wood v. Hartley*, 10 A. & E. 619. In debt against a devisee on the bond of his testator, the devisee of an annuity charged on the real estate is not competent to prove the bond to be a forgery, though it does not appear whether the estate may not be sufficient to answer both charges. *Bloor v. Davies*, 7 M. & W. 235. In ejectment by mortgagee, a later mortgagee is incompetent for the defendant to show the first to have been void for fraud. *Doe v. Bamford*, 11 A. & E. 786. So, a witness who has a power of attorney from the plaintiff to receive the sum recovered, and admits his intention to deduct thereout a debt due from the plaintiff. *Powell v. Gordon*, 2 Esp. 735. So on an issue out of the Exchequer to try a modus in a district, an occupier within it is incompetent to support it. *Stewart v. Barnes*, 1 M. & Rob. 472.

Wherever a verdict for one of the parties to the record would be evidence for the witness in a subsequent action by him, he is incompetent to support the case of that party; and where such verdict would be evidence against the witness, he is incompetent for the opposite party. Thus, if he claims a customary right of common, he is incompetent to support the case of another person claiming under the same custom, for the verdict would be evidence for himself. *Walton v.*

Shelley, 1 T. R. 302. But it is otherwise where the right of common is claimed by prescription in a *que estate*. *Harvey v. Collison*, 2 Sch. N. P. 1118. In a suit to try a prescriptive right of toll on all fish landed in a certain cove, a fisherman frequenting the cove was held incompetent against the claim; *Falmouth v. George*, 5 Bing. 286.; for even though the pleadings do not set forth the right, yet the judgment, coupled with parol evidence of the question in issue, would be evidence against the witness. *Ibid.* 293. But see *Lancum v. Lovell*, post, p. 115. So, in trover by the lord for trees cut down by a copyholder, a copyholder cannot prove a customary right for copyholders to take timber for repairs. *Le Fleming v. Simpson*, 2 M. & R. 169. On an issue upon an occupation way, the occupier of part of the tenement to which the way belongs is incompetent to prove it. *Parker v. Mitchell*, 11 A. & E. 788. If the plaintiff has agreed with the witness that, in case he recovers the lands, the witness shall have a lease of them for so many years, the witness is incompetent for him; *Gibb. Ev.* 122.; for in an action by the witness on such agreement the judgment obtained on his own evidence would form part of his proofs. So a witness is incompetent for the plaintiff who is to repay a sum of money to the plaintiff if he fails, but to retain it if he succeeds. *Potheringham v. Greenwood*, 1 Stra. 129.

In an action on the case for negligently driving a coach against the plaintiff's waggon-horse, whereby it died, it was held that the plaintiff's waggoner was incompetent to prove the negligence of the defendant without a release from his master; *Morish v. Foote*, 8 Taunt. 455.; *Sherman v. Barnes*, 1 M. & Rob. 69.; at least, if there be any evidence of fault or negligence on the part of the plaintiff's servant; or if the case, as opened, is evidently one in which either the witness or the defendant must have been in fault. See the observations of the judges in *Boorman v. Brown*, 9 A. & E. 487. In the last-mentioned case, the issue was whether the defendant, a broker employed by the plaintiff to sell goods, had negligently delivered them without payment; it was held that the plaintiff could not call a servant of his own to prove that he, the witness, delivered them by defendant's authority; for the effect is to shift his own *prima facie* liability on the defendant. So in an action by the insured against the insurer of goods, where the defence was unseaworthiness, the shipowners cannot be called by the plaintiff. *Protheroe v. Elton*, cited 8 Taunt. 457.; *S. C.* 1 Peake, 117. In an action on the warranty of a horse, the person, who had previously sold it with warranty to the defendant, was held incompetent to show, in his behalf, that it was sound at the time of the first sale. *Biss v. Mountain*, 1 M. & Rob. 302., and note, *ibid.*

In an action against a master for the negligence of his servant, the servant was held incompetent to disprove the negligence, because the verdict would be evidence of the amount of damages in an action by the master against the servant; *Green v. New River Company*, 4 T. R. 569.; and so of an agent in an action against his principal for negligence. *Gevers v. Mainwaring*, Holt, 139. So the broker who made the distress is incompetent for the defendant in an action for an excessive distress. *Field v. Mitchell*, 6 Esp. 73. So in trover against a sheriff, the officer who made the levy is not a competent witness for the defendant, though he is indemnified by the execution creditor. *Whitehouse v. Atkinson*, 3 C. & P. 344. But in an action against

A sheriff for negligently executing a writ, an assistant of the sheriff's officer, employed by the officer to execute the writ, was held competent for the sheriff without a release from the officer, on the ground that the verdict could not be used against the witness, as he was not employed by the defendant. *Clark v. Lucas*, R. & M. 32. In an action against the sheriff for an improper return to a *fi. fa.* stating a payment for arrears of rent which one of the plaintiff's witnesses denied to be due, the landlord was held not competent for the defendant to prove the rent due; for, if the action succeeded, the witness would be liable to the sheriff, and this judgment would be evidence of special damage. *Keightley v. Birch*, 3 Camp. 521.

If the judgment can be used in a subsequent action against the witness to establish the amount of costs, the whole or a portion of which the witness would be bound to pay, he is incompetent. Thus, bail cannot give evidence for their principal; *Carter v. Pearce*, 1 T. R. 164.; nor the wife of the bail; *Cornish v. Pugh*, 8 D. & R. 65.; nor a person who has paid money into the hands of the sheriff on behalf of the defendant in lieu of bail. *Lacon v. Higgins*, D. & R. N. P. C. 38.; *S. C.* 3 Stark. 184. To make the bail a witness, the party may apply to the court to have his name struck off on justifying other bail. *Tidd*, 264.; and see *post*, "Incompetency, how removed." On the same ground, where an infant sues, his *prochein amy* or guardian is not a competent witness for him. *James v. Hatfield*, 1 Stra. 548. *Gib. Ev.* 107.

It is well established that a person who has received money due from the defendant to the plaintiff is not competent for the defendant to prove that he received it as agent for the plaintiff, or in his own right, if his conduct has been such that he would be liable, in the event of a verdict for the plaintiff, to pay the defendant not only the money received but also the costs of that action on which the plaintiff should recover. *Per* Littledale J., in *Larbalestier v. Clark*, 1 B. & Ad. 902. It has been observed that this rule is easy of application where the witness is clearly liable over to one of the parties by his engagement, express or otherwise; as in the case of principal and surety, or of accommodation bills; but in other instances it tends to introduce collateral inquiries of considerable extent and difficulty, especially where misconduct in the nature of deceit is the alleged ground of the witness's liability. See note by the reporters, *ibid.* The inquiry is now become of less importance, in consequence of the statute hereafter to be mentioned.

An interested witness is rejected, though he himself is not aware that the facts, stated by him on the *voire dire*, give him any legal interest. *Doe v. Bragg*, R. & M. 87.

An insolvent is not a competent witness for the plaintiffs in an action by his assignees; for his future property is liable; *Delafield v. Freeman*, 4 C. & P. 67.; and the creditor of an insolvent who had assigned his effects to trustees, is said to have been rejected, as not a competent witness for the insolvent, in an action by a stranger against him, defended by the trustees; the witness admitting it to be doubtful whether the estate would pay 20s. in the pound. *Crerer v. Sodo*, 3 C. & P. 10. As to the competency of bankrupts, &c., see *post*, "Actions by Assignees of Bankrupts."

Statute 3 & 4 W. 4. c. 42. and its construction.] By sect. 26. of this statute, in order to render the rejection of witnesses on the ground of interest less frequent, it is enacted, that if any witness shall be objected to as incompetent on the ground that the verdict or judgment in the action, on which it shall be proposed to examine him, would be admissible in evidence for or against him, such witness shall nevertheless be examined; but in that case a verdict or judgment in that action, in favour of the party in whose behalf he shall have been examined, shall not be admissible in evidence for him or any one claiming under him; nor shall a verdict or judgment against the party, on whose behalf he shall have been examined, be admissible in evidence against him or any one claiming under him.

And, by sect. 27., the name of every witness objected to as incompetent on the ground that such verdict or judgment would be admissible in evidence for or against him, shall *at the trial* be indorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the court, at the request of either party, and shall be afterwards entered on the record of the judgment; and such indorsement or entry shall be sufficient evidence that such witness was examined in any subsequent proceeding in which the verdict or judgment shall be offered in evidence.

Several cases, ruled *at nisi prius* shortly after the passing of this act, tended to restrict its operation, but it has been since construed with greater liberality. The object has been stated to be to supersede the necessity and save the expense of a release in the cases to which it applies; *per Alderson B.*, in *Yeomans v. Legh*, 2 M. & W. 421. And an actual indorsement on the record is unnecessary; *per Alderson B.*, in *Rees v. Walters*, 3 M. & W. 527. 529. In an action for negligent driving by defendant's servant, the servant was held to have been rendered competent for the defendant by this act without a release; for his only interest is that the verdict may be evidence of the damages in an action by his master against him; *Yeomans v. Legh*, 2 M. & W. 419. So where defendant in trespass justifies as servant of A. B., A. B. is competent for him under this act; *Creevey v. Bowman*, 1 M. & Rob. 496. So in an action against the specific legatee of a chattel, which the plaintiff asserted to belong to him and to have been left with the testator only on trial, the executor of the latter is rendered a competent witness for the plaintiff; for his only interest in the event is that if the plaintiff gets the value from the defendant, he cannot afterwards sue the witness for it. *Bowman v. Willis*, 3 New Ca. 669. Some recent cases, however, show that the effect of the statute is still unsettled. Thus the case of *Boorman v. Brown*, 9 A. & E. 467. cited *antè*, p. 109., appears to be at variance with *Yeomans v. Legh*; and the *nisi prius* cases of *Stanley v. Jobson*, 2 M. & Rob. 103., and *Green v. Warburton*, *Id.* 105., seem not reconcilable with *Creevey v. Bowman*. See also *Jervis's New Rules*, 420, 421., note (b), 4th ed.

The effect of the act seems to be equivalent to a release in cases where evidence of the verdict and judgment is essential in order to enforce the liability of the interested witness; thus in the case of *Yeomans v. Legh*, *suprà*, the master could not effectually sue his servant with a view to indemnify himself, without shewing the damages recovered in the former

action. *Per Coleridge J., Bailiffs of Godmanchester v. Phillips, 4 A. & E. 568.*

The statute does not operate in cases where the witness has a definite interest independent of the use that may be made of a verdict. Thus in an action by a corporation to establish an exclusive right of common, a corporator is not rendered competent for the plaintiffs. Disfranchisement can alone make him a witness. *Bailiffs of Godmanchester v. Phillips, 4 A. & E. 550.* On an issue to try the validity of a district modus, an occupier of land within it is not made competent to prove it. *Stewart v. Barnes, 1 M. & Rob. 472.* Nor does the statute apply to issues out of a court of equity. *S. C. Ibid.* A creditor of an insolvent is not rendered a competent witness for the plaintiff in a suit by the assignee for the benefit of the estate. *Holden v. Hearn, 1 Beavan, 445.* So where the joint owner of a house with the plaintiff has conveyed his share to the plaintiff with usual covenants of title, he is not rendered competent for the plaintiff in an action to establish any easement conveyed therewith. *Steers v. Carwardine, 8 C. & P. 570.*

What is not such an interest as excludes.] The circumstance of the witness standing in the same situation as the party by whom he is called, is not sufficient to exclude his evidence. Thus in the case of two actions brought against two persons for the same assault, in the action against one the other may be a witness. *Per Ashurst J., Walton v. Shelley, 1 T. R. 301.* So in an action against an underwriter, another underwriter on the same policy is a good witness for the defendant; *Bent v. Baker, 3 T. R. 27.*; unless there be a consolidation rule. A witness who believes himself under an obligation of honour to indemnify the bail, but who has entered into no engagement to indemnify, is competent. *Pederson v. Stoffles, 1 Camp. 145.* There are however authorities that a witness who believes himself *legally* interested is incompetent. See *Trelawney v. Thomas, 1 H. Bl. 307.*, and the cases cited 1 *Stark. R.* 103. (2d ed.) If this be law, the witness is not made competent by the 3 & 4 W. 4. c. 42. Unless the verdict would be evidence for or against the witness in a subsequent action, it is no objection to his competency that a future jury may hear of, and be biassed by, it. Thus, on an indictment for obtaining a promissory note by a cheat, the person cheated is admissible, though the conviction might influence the jury in an action against him on the note. *R. v. Bray, Hardw. 358.* The borrower of money for an usurious consideration is a competent witness for the plaintiff in an action for penalties against the lender. *Abrahams v. Bunn, 4 Burr. 2251.* In trover by A. against B., C. is a competent witness to prove property in himself, for the verdict can be of no use to him. *Ward v. Wilkinson, 4 B. & A. 410.* In ejectment by one claiming as heir of B., the son of an elder brother of B. is a competent witness for defendant to show a better title in himself; for if defendant succeeds, this will not benefit the witness; and if plaintiff succeeds, the expulsion of defendant will not injure him, unless it be shown that defendant is his tenant. *Doe v. Clarke, 3 New Ca. 429.* In trespass *q. c. f.*, where the title was in issue, the person under whom defendant justified was held competent for him; and, as it seems, without the aid of the late statute. *Rees v. Walters, 3 M. & W. 527.* In ejectment by the mortgagee of a corporation lease, a person liable to the borough

rate is not therefore incompetent for the plaintiff. *Doe v. Maple*, 3 New Ca. 832. An heir apparent is a good witness concerning the title to the land; for his interest is a mere contingency. *Smith v. Blackham*, 1 Salk. 283. In ejectment by one who claims by devise, a witness, who claims an undivided interest under the same will, is competent for the plaintiff to prove the sanity of the testator. *Doe v. Pearce*, 5 M. & W. 506. An official assignee may support the fiat, though his salary depends on its validity; for he cannot enforce payment of it. *Giles v. Smith*, 1 M. & Rob. 443.

Where a witness is equally interested on both sides, he is a competent witness for either. Thus, in an action for money had and received, a witness may prove the money paid by the defendant to him as agent for the plaintiff, since he is liable to one or the other of the parties. *Ilderton v. Atkinson*, 7 T. R. 480. In trover for a bill, given by the plaintiff to an agent to get discounted, and by such agent wrongfully pledged to the defendant, the agent is competent for the plaintiff. *Pancourt v. Bull*, 1 New Ca. 681. The payee of an accommodation note is competent to prove that he indorsed it to the plaintiff, before it became due, in payment for goods; for though he would be liable to the plaintiff for goods sold if the action failed, yet if it succeeded he would be liable to the defendant for money paid. *Shuttleworth v. Stephens*, 1 Camp. 408.

Where the witness is liable over in either event, yet if he would also be liable to costs as special damage in one event, but not in the other, he will be incompetent. Thus, although the drawer is competent for either side in a suit by indorsee against acceptor, yet if the defendant accepted for the drawer's accommodation, the latter is bound to indemnify him against the costs of the action, and therefore cannot be called as his witness. *Jones v. Brooke*, 4 Taunt. 464.

A. conveyed a close to B., and afterwards to C. without covenant for title; C. mortgaged it to A. In trespass *q. c. f.* by B. against C., A. is competent for the defendant; for the result cannot affect his interest, nor the verdict be evidence for him. *Simpson v. Pickering*, 1 C. M. & R. 527. Defendant pleaded and proved payment to plaintiff's agent; the agent was held competent for plaintiff to show that he (the witness) paid it back again to the defendant; and *per Parke B.*, even if the agent had made himself liable to plaintiff by improperly suppressing the fact of payment, the stat. 3 & 4 W. 4. c. 42. would have applied. *Bowers v. Evans*, 1 M. & W. 214. In an action by a party or his executor, an unpaid creditor is competent for him, though the effect is to increase the solvency or the assets; for such interest is too remote and uncertain. *Paull v. Brown*, 6 Esp. 34. In trespass against an administrator for taking goods, one of the next of kin is competent for the defendant to prove property in the intestate. *Thomas v. Bird*, 9 M. & W. 68. In an action for funeral expenses against a person not executor, a residuary legatee is competent for the plaintiff; for the reasonable expenses are ultimately chargeable on the estate. *Green v. Salmon*, 8 A. & E. 348. So an annuitant creditor is a witness to defeat a claim on the assets; *Nowell v. Davies*, 5 B. & Ad. 368.; and *semb.*, the solvency or insolvency of the testator's estate would not alter the case; *ibid.* But see *Craig v. Cundell*, 1 Camp. 381. *contra*; and it has been observed by Mr. Williams (2 *Executors*, p. 1347. 2d ed.) that a verdict and judgment against the executor is pleadable by him against

the creditor. In *Burghart v. Hall*, 4 M. & W. 727. n., the question arose whether a legatee, whose legacy would exhaust the assets, is competent for the defendant in an action against the executor: the case was much discussed, but no judgment was given; and in a subsequent case of *Bloor v. Davies*, 7 M. & W. 235. (cited *antè*, p. 108.), Parke B. expressed an opinion that, though stat. 3 & 4 W. 4. c. 42. removed any objection on the ground of the admissibility of the verdict and judgment, the disqualification arising from an interest in the fund itself was not removed, and that this consideration was overlooked in *Nowell v. Davies*, *suprà*, p. 113. Where plaintiff claimed under B., and defendant under C. who also claimed under B., B. was held competent for the defendant on a release from C.; and *per* Best C. J., he was competent even without one, for the interest is too remote, and a succession of releases would otherwise be required in some cases. *Radburn v. Morris*, 4 Bing. 649. In an action by a reversioner, the tenant in possession is competent for him against a third person for an injury to the freehold. *Doddington v. Hudson*, 1 Bing. 257. In trover for a chattel delivered to defendant on a representation that he was A.'s servant, A. is competent for defendant to show that fact; for, if so, the plaintiff should sue A. *Grylls v. Davies*, 2 B. & Ad. 514.

The circumstance that the witness may possibly be exposed to an action, in case the fact in question is found against his testimony, is not sufficient to render him incompetent; for it is not an interest in the fact proved, but in the result of the suit, that disqualifies. Thus, a corporate officer may be called to show the usage of the office, though, if his acts be illegal, he will himself be liable to a *quo warranto*. *R. v. Bray*, *Hardw.* 356. The bare possibility of an action being brought against a witness is no objection; and therefore, in an action against an administrator, one of the sureties for the defendant's due administration of the intestate's effects, is a competent witness on behalf of the defendant to prove a tender. *Carter v. Pearce*, 1 T. R. 163.

Trustees and executors in trust, not taking a beneficial interest, are competent witnesses for their *cæstui que trust*, &c. *Gillb. Ev.* 120. *Lowe v. Jolliffe*, 1 W. Bl. 366. *Goodtitle v. Welford*, 1 Doug. 140. And a creditor, who has made an equitable assignment of his debt, though only by parol, is a competent witness to increase the fund out of which the debt is to be paid. *Heath v. Hall*, 4 Taunt. 326.

Where witnesses, though interested, are admissible.] Some witnesses, to whom the objection of interest applies, are nevertheless admissible in various cases, either from necessity; policy; or the express provision of some statute.

Agents are, in certain cases, competent witnesses for their principals, from necessity, and for the sake of trade and the common usage of business. *B. N. P.* 289. Thus a porter may prove delivery of goods. *Ibid.* The bookkeeper of defendant (a carrier) may prove the direction on a parcel, in order to show it had not been misdelivered. *Spencer v. Goulding, Peake, N. P.* 129. A banker's clerk is a competent witness to prove that he has paid money by mistake, in an action by the banker to recover it back. *Martin v. Horrel*, 1 Stra. 647. And in an action against a carrier for not delivering a parcel, his servant is competent to prove the delivery. *Ross v. Rowe*, 3 Ford's MSS. 98., cited 2 Stark. Ev. 754. 1st ed. In an action to recover a payment

made to the defendant by mistake, plaintiff may call the carrier to prove that he had misdelivered the money to defendant instead of to another person. *Barker v. Macrae*, 3 Camp. 144. A factor or broker is competent for either party to prove the contract between them, whether paid by commission or part of the proceeds. *Dixon v. Cooper*, 3 Wils. 40. *Benjamin v. Porteus*, 2 H. Bl. 590. So he is a witness for the plaintiff in an action on a policy, though he has a lien on the proceeds for his premiums. *Hunter v. Leathley*, 10 B. & C. 858.

The admissibility of an agent, to prove facts connected with a contract, is confined to the ordinary transactions of commerce, and is usually grounded on the necessity of the case and on the exigency and convenience of commerce. It does not extend to acts which are tortious, and out of the ordinary course of employment; thus in an action against a master for the negligence of his servant, the latter, as we have seen, is incompetent to disprove the negligence; *Green v. New River Company*, 4 T. R. 589. Nor does it extend to a person who is employed as an agent to get a bill discounted, and has so dealt with it as to be liable to indemnify the party employing him in the event of a verdict against the latter. *Edmonds v. Lowe*, 8 B. & C. 408. So if a person enters into a contract for the purchase of goods in his own name, he is not a competent witness for the plaintiff in an action for goods sold and delivered, to prove that he purchased them as agent for the defendant. *McBrain v. Fortune*, 3 Camp. 317.

When the issue is on a public right claimed by all the king's subjects, persons who have exercised the right, though interested in supporting it, are admissible; for there would otherwise be no unexceptionable witness at all. Thus in an action for toll traverse, persons, who have resisted payment, may prove for the defence that it was a public highway; and this case was distinguished *arguendo* from that of *Ld. Falmouth v. George*, *supra*, p. 109., which affected only portions of the public. *Lancum v. Lovell*, 9 Bing. 465—7.

Though, in general, informers entitled to part of the penalty are not competent witnesses, yet, where a statute can receive no execution unless a party interested be a witness, he must then be admitted; *Gill. Es.* 128.; for it is an implied exception. In an action against the hundred on the statute of Winton, 13 Ed. I. c. 2., the plaintiff (the party robbed) was always admitted *ex necessitate* to prove the robbery, and the amount of the loss; but not to prove any other facts in support of his case; as that the place where he was robbed is within the hundred. *B. N. P.* 187. *Per* Page J., *R. v. Reading*, *Hardw.* 83. This statute has been repealed, and the cases on it are therefore now unimportant.

In an action under statute 2 G. 2. c. 24. s. 8., for penalties for bribery at an election, the informer is held to have been thereby made a competent witness. *Heward v. Shipley*, 4 East, 180. In an action against churchwardens or overseers for money mis-spent by them, inhabitants of the parish, who do not receive alms or any gift out of the parochial collection, are rendered competent witnesses by statute 3 W. 4. c. 11. s. 12. So where penalties are given to the use of the poor for the benefit and exoneration of the parish, or other place, the inhabitants are rendered competent witnesses by statute 27 G. 3. c. 29. provided the penalty does not exceed 20*l.* *R. v. Davis*, 6 T. R. 177. So in an action against the hundred, the inhabitants of the hundred

may be witnesses by statute 7 & 8 G. 4. c. 31. see *post*, "*Actions against Hundredors*." Again, in cases relative to the execution of the highway act, 5 & 6 W. 4. c. 50., inhabitants of the parish, and the treasurer, clerk, surveyor and other officers appointed under the act, are not thereby disqualified in any action under or by virtue of the act; sect. 100. In actions for turnpike tolls, the collector is a competent witness, 3 G. 4. c. 126. s. 59. By the customs act, 3 & 4 W. 4. c. 53., any officer of the army, navy, or marines, being duly authorised, and on full pay, or officer of customs or excise, shall be deemed a competent witness upon the trial of any suit or information on account of any seizure or penalty, notwithstanding such officer or other person may be entitled to the whole or any part of such seizure or penalty. By 6 & 7 W. 4. c. 104, no burgess of any borough, named in schedules (A.) & (B.) of the Municipal Corporation Act, shall be deemed incompetent in any suit, by reason of his being a member of such body corporate or interested in the borough fund.

By statute 54 G. 3. c. 170. s. 9., no inhabitant or person rated or liable to be rated to any rates or cesses of any district, parish, township, or hamlet, or wholly or in part maintained thereby, or executing or holding any office thereof or therein, shall be deemed, by reason thereof, an incompetent witness for or against such district, parish &c. in any matter relating to such rates or cesses, or to the boundary between such district &c. and any adjoining district &c.; or in any matter relating to any order of removal to or from such district; or to the settlement of any pauper in such district; or touching any bastards chargeable &c.; or touching the recovery of any sum for the charges or maintenance of such bastards; or the election or appointment of any officer; or the allowance of the accounts of any officer of any such district.

Under this statute, a person, who occupies rateable property within a chapelry, is a competent witness to prove that a certain messuage is within the chapelry. *Maraden v. Stansfield*, 7 B. & C. 815. The statute was held to render inhabitants competent in an action by the surveyor of highways against his predecessor for penalties; *per* Ld. Tenterden, *Heudebourck v. Langston*, M. & M. 402. (n); and on the authority of this case, Tindal C. J. held that rated parishioners were admissible to prove a liability *ratione tenuræ*. *R. v. Hayman*, M. & M. 401. So a rated inhabitant is competent to support an avowry for a highway rate. *Morrell v. Martin*, 6 New Ca. 373. On the other hand, it has been ruled that, in an action against an overseer for medical attendance on a pauper, a rated inhabitant who has sanctioned the defence of the action is not rendered competent for the overseer by the above statute. *Totthill v. Hooper*, 1 M. & Rob. 392. And on an issue to try a customary right to take shingle for the repair of highways in the parish, persons contributing to the highway rate were held incompetent to support the right; and the court inclined to the opinion that the act of parliament was limited, in its scope and by its preamble, to cases concerning the poor rates. *Oxenden v. Palmer*, 2 B. & Ad. 236. See also *R. v. Auckland*, 1 A. & E. 744. But *Oxenden v. Palmer* has been overruled by *Doe v. Adderley*, 8 A. & E. 602., where it was ruled that, in ejectment by parish officers to recover parochial premises, rated inhabitants are rendered competent for the plaintiff. Unless, indeed, they are contributory to the action by any personal engagement; *Doe v. Webster*, 12 A. & E. 442. In ejectment by parish officers to recover

premises belonging to the parish, rated inhabitants are competent for the plaintiff without resorting to the statute, at least unless it appears that they were not let at their fair value. *Doe v. Cockell*, 4 A. & E. 478.

By stat. 3 & 4 Vict. c. 26. s. 1., no person shall be disabled from giving evidence by reason only of being, as the inhabitant of any parish or township, rated or liable to be rated to the relief of the poor, or maintenance of church, chapel, or highways, or "for any other purpose whatever." And, by sect. 2. no officer of a parish, township, or union, or person liable to rates, shall be disqualified by being a party to a trial &c., or liable to costs, when he is only nominal party, and only contributory to such costs with the other rate payers.

Incompetency of Witness, as Party to the Suit.

A person who is a party on the record (though he be merely a trustee, *Bauerman v. Radenius*, 7 T. R. 663.), is incompetent as a witness for himself, or a joint suitor. *Gill. Ev.* 130. But where the witness is not, technically, a party, and is disinterested, he is admissible. Thus in an action against the incorporated governors of the Foundling Hospital for work done by the plaintiff for the use of the hospital, Lord Kenyon admitted several of the governors as witnesses for the defence. *Weller v. Governors of Foundling Hospital*, Peake, 153. So where the mayor and commonalty of London were plaintiffs, and the question was, whether the corporation were entitled to certain tolls, it was held that freemen, members of the corporation, might be called in support of the claim; because the tolls were received for the benefit of the whole corporate body; *R. v. Mayor, &c. of London*, 2 Lev. 231.; 1 Vent. 351; *Sutton Coldfield v. Wilson*, 1 Vern. 254. But this decision has been doubted, and it has been said that there is no general rule as to the exclusion of corporators, but they are admissible, or not, according to their interest. *B. N. P.* 290. See *Burton v. Hinde*, 5 T. R. 174. *Brown v. Shuker*, 1 C. & J. 587. And in a late case; it was held that a corporator was not a competent witness in an action brought by the corporation to recover corporate lands from the lessee, though he had released his interest in the subject matter of the suit; for, in case of a verdict against the plaintiffs, the corporate funds would at all events be decreased by the amount of the costs. *Doe v. Tootb*, 3 Y. & J. 19. So in trespass *q. c. f.* by a corporation, where defendant pleads a right of common, a freeman is inadmissible for the plaintiff, though he has released his own rights to the corporation; for this is, in effect, a release to himself. *Bailiffs of Godmanchester v. Phillips*, 4 A. & E. 550.

If the witness is substantially a party to the record, he is incompetent, though not nominally a party. Thus, in an action against one of several partners, the defendant cannot call his co-partners. *Simons v. Smith*, R. & M. 29.; *Wilson v. Hirst*, 4 B. & Ad. 760. But see *Poole v. Palmer*, 9 M. & W. 71. post, p. 120. Yet where a local act empowered the directors and overseers of the poor of a parish to sue and be sued in the name of their clerk, and they were not personally liable, it was held, in an action for goods supplied to the directors, that a person, who was one of the directors when the goods were supplied, was competent for the defendant; for he was neither interested, nor a nominal party. *Fletcher v. Greenwell*, 1 C. M. & R. 754. So where the vestry clerk sues in his own name under a local act, one of the

vestry is competent for the plaintiff; for the members of the vestry have no private interest, and are merely discharging a public duty. *McGahey v. Alston*, 2 M. & W. 206. The case of *Whitmore v. Wilks*, M. & M. 214., therefore seems not to be law.

A party under whom defendant makes cognizance is not competent for him; see *post*, "*Replevin*;" unless the cognizance be abandoned at the trial. *King v. Baker*, 2 A. & E. 383. Nor is the lessor of the plaintiff competent for him in ejectment, unless his name be used without his consent, and a verdict be taken for defendant on his demise. *Id.* 339. So the party, under whom defendant justifies in trespass, is a good witness for him on other pleas, if he did not authorize the defence and the justification be found against the defendant. *Id. ibid.*

A party to the suit cannot be compelled to give evidence for the opposite party. Thus, in an action of ejectment on the several demises of two lessors, one of the lessors is not compellable to give evidence for the defendant, though no title is proved in him; *Penn v. Granger*, 3 Camp. 178.; but it is otherwise, if he has been improperly put on the record to exclude his testimony. *Semb. Id. ibid.*

One of several co-plaintiffs may be called for the defence, if he does not himself object; *Norden v. Williamson*, 1 Taunt. 378.; or one of the several co-defendants for the plaintiff, if not interested. *Worrall v. Jones*, 7 Bing. 395. 399. But *quære*, whether the consent of all the defendants be not necessary? *Mant v. Mainwaring*, 8 Taunt. 141. *post*, p. 119.

Co-defendant, when competent.] Where a person is arbitrarily made defendant to exclude his testimony, he may, if nothing is proved against him, be acquitted and sworn as a witness for the other defendants. *B. N. P.* 285. And the general rule, as recently determined by all the judges with regard to defendants not fixed by the evidence, is, that the verdict in their favour is to be taken at the end of the plaintiff's case. *Child v. Chamberlain*, 6 C. & P. 213. *S. C.* 1 M. & Rob. 318. This, however, must be confined to cases where the witness has only pleaded "not guilty." *Hitchen v. Teale*, 2 M. & Rob. 30. If there be the slightest evidence against one of the defendants, he cannot be acquitted so as to make him a witness. *Peake Evid.* p. 168. And the application to acquit is to the discretion of the judge, who may take into consideration the evidence likely to arise before the cause is over. *Sowell v. Champion*, 6 A. & E. 407.

Co-defendant bankrupt, when competent.] In assumpsit, where one defendant pleads a plea operating in his personal discharge, as bankruptcy, which is denied, a verdict may be taken for him on that plea, and he may then be examined as a witness for his co-defendants. *Bate v. Russell*, M. & M. 332. But see *Blenkinsop v. Clayton*, 7 Taunt. 599. So, where one of several defendants pleads his bankruptcy and certificate in bar, and a *nolle prosequi* is entered as to him, he is a competent witness for his co-defendants; for in case of a verdict for the plaintiff, the demand of the co-defendant against the witness is barred by the certificate. *Moody v. King*, 2 B. & C. 558. And even where the defendants were partners in the transaction, it was held that the one who had pleaded his bankruptcy and certificate, and against whom a *nolle prosequi* was entered, was a good witness for his co-defendant after releasing his

surplus; for the co-defendant's demand, in case of a verdict for the plaintiffs, would be proveable under the witness's commission. *Aflalo v. Fourdrinier*, 6 Bing. 306. S. C. M. & M. 334. (n.).

Co-defendant when competent — suffering judgment by default in an action ex contractu.] Where one of several defendants suffers judgment by default in an action on a contract, he is not competent for the other defendants to negative the contract; because if the action should fail as to one, it will fail as to all the defendants; *Brown v. Fox*, 1 Phill. Ev. 78.; nor is he competent for the plaintiff to prove a joint contract, for should the plaintiff succeed, the witness will be entitled to contribution against his co-defendants. *Brown v. Brown*, 4 Taunt. 752. *Green v. Sutton*, 2 M. & Rob. 269. Accord. unless his co-defendants consent; *Mant v. Mainwaring*, 8 Taunt. 139. But *quare* the principle of the two last cases? for a witness cannot easily have an interest on both sides; and if a verdict for the plaintiff will make him partially liable, and one for the defendant not liable at all, he seems interested only in defeating the action. In an action of debt on a bond against three, of whom two were sureties only, the principal debtor let judgment go by default; at the trial he was admitted as a witness for the plaintiff to prove a breach of condition, and the court confirmed the ruling, on the ground that, being the principal, he could have no contribution, and that interest is the only reason for excluding the testimony of a party to the suit. *Worrall v. Jones*, 7 Bing. 395. A co-defendant suffering judgment by default may be subpoenaed by the other defendants (his partners) to produce a deed. *Colley v. Smith*, 4 New Ca. 285.

Co-defendant, when competent — suffering judgment by default in action ex delicto.] Where one of several defendants suffers judgment by default in an action of tort, he is a competent witness for his co-defendants to prove that he alone is liable; for, though they should be acquitted, he would still remain liable, and he is not necessarily liable to the costs of the issue tried against the others. *Ward v. Haydon*, 2 Esp. 553. So if one of several defendants in ejectment lets judgment go by default, or consents to a verdict as to so much as he is proved in possession of, he may be admitted as a witness by the other defendants. *Dormer v. Fortescue*, B. N. P. 98. 285. But where the jury were as well to try the issues, as to assess the damages against him who had suffered judgment to go by default, Best C. J. refused to receive the evidence of the latter for his co-defendants. *Mash v. Smith*, 1 C. & P. 577. So in *Webber v. Budd*, Exeter Sum. Ass. 1826, Burrough J. refused to admit a co-defendant under similar circumstances as a witness for a defendant who had pleaded to an action for an assault proved to be a joint one; for he was interested in reducing the damages which might be wholly levied on him. So where there is a plea on the record which, if found for the defendant, will discharge the co-defendant who has let judgment go by default (as there may be in an action of tort; see *Biggs v. Benger*, 2 Ld. Raym. 1372.) it should seem that such co-defendant is as much interested as in an action *ex contractu*.

A co-trespasser, who has suffered judgment by default, has been held incompetent for the plaintiff against his co-defendants. *Chapman v. Graves*, 2 Camp. 333. (n.). Yet this appears to be at variance with the case of *Worrall v. Jones*, 7 Bing. 395. *supra*, p. 119. which decides that

interest is the sole ground for exclusion. And in an action of ejectment against two defendants, one of them, who had suffered judgment to go by default, was held by Lord Ellenborough to be a competent witness for the plaintiff to prove the other defendant in possession; on the ground that the only supposed interest imputable to him was the possibility of the plaintiff suing the other defendant only, for mesne profits, in case he recovered in the ejectment. *Doe v. Green*, 4 *Esp.* 198.

Co-contractor and co-trespasser, not on the record, when competent.] In an action for goods sold, the plaintiff's son is competent for him, though they are ostensible partners in the business, if there is, in fact, no partnership as between themselves. *Barker v. Stubbs*, 1 *M. & G.* 44. A witness, proved to be a partner with the defendant in a contract is not competent to prove that he alone is liable to the plaintiff; for he has an immediate interest to discharge himself from his share of the costs in case the plaintiff recovers. *Goodacre v. Breame, Peake*, 175. Nor can he be called in any way to defeat the action or lessen the damages; *Hall v. Cecil*, 6 *Bing.* 181.; or to prove that goods were sold to defendant and himself jointly, and had been paid for. *Evans v. Yeatherd*, 2 *Bing.* 133. But he can be rendered competent by a release from the defendant; *Wilson v. Hirst*, 4 *B. & Ad.* 760.; *Jones v. Pritchard*, 2 *M. & W.* 199.; though there are other partners besides the plaintiff and defendant; *Beckett v. Wood*, 6 *New Ca.* 380.; and the *Nisi Prius* cases *contra*, *Simons v. Smith*, *R. & M.* 29., and *Cheyne v. Koope*, 4 *Esp.* 112., are not law. Where A. was sued on a joint and several note by him and B., and pleaded illegality, B. was not admitted to support the plea. *Slegg v. Phillips*, 4 *A. & E.* 852. But since 3 & 4 *W.* 4. c. 42. it has been held that a co-contractor, not sued, is competent for the defendant; for if the plaintiff fails, he may sue the witness who cannot use the judgment in his defence. *Poole v. Palmer*, 9 *M. & W.* 71. *Russell v. Blake*, 2 *M. & G.* 374.

A co-contractor with the defendant, not joined, is a competent witness for the plaintiff; for he is interested in defeating the action; *Blackett v. Weir*, 5 *B. & C.* 385.; and this, whether his interest in the contract appears by extrinsic evidence, or on the *voire dire*. *Hall v. Curzon*, 9 *B. & C.* 646. So upon an issue on a plea in abatement for non-joinder of another contractor, the latter is a competent witness for the plaintiff to prove that the contract was made with the defendant alone; *Hudson v. Robinson*, 4 *M. & S.* 475.; but not for the defendant. *Evans v. Yeatherd*, 2 *Bing.* 133. So in covenant against the executor of the assignee of a lease, where defendant pleaded that the assignment was to the testator and J. S., jointly, who was still living; J. S. was held competent for the plaintiff to prove that he, J. S., had never accepted the assignment; for he was nevertheless liable to the defendant for contribution, if really a joint assignee. *Fowler v. Round*, 5 *M. & W.* 478.

It has been held that a dormant partner, not joined as plaintiff, may be called as witness for the plaintiff; *Mawman v. Gillett*, 2 *Taunt.* 325.; but this is questionable, and apparently against the opinion of the court in *Lloyd v. Archbottle*, 2 *Taunt.* 324.

In actions of *tort* a co-trespasser, not sued, is, in general, competent for the defence, though named in the declaration under a *simul cum*, &c.; *Poplet v. James*, *B. N. P.* 286.; unless he be proved guilty, and

the plaintiff has made him a party by suing out process against him; *S. C. ibid. Cotton v. Lattrell*, 1 *Atk.* 452., 12 *Viner Ex.* 404.

So co-trespassers are competent for the plaintiff, though omitted for that purpose, and though satisfaction from the defendant is a discharge of the witness. *B. N. P.* 286.; *Morris v. Daubigny*, 5 *B. Moore*, 319.; and see *Berkeley v. Dimery*, 10 *B. & C.* 113.; *Blackett v. Weir*, 5 *B. & C.* 387.

Incompetency of Husband and Wife.

Neither the husband nor the wife of a party to the suit is competent to give evidence for or against such party. *B. N. P.* 286. So, though not a party to the suit, if the husband or wife of the witness be interested in the event of the suit. Thus, in an action by the executrix of a surviving trustee under a marriage settlement to recover the value of certain goods sold by the defendant as sheriff under an execution against the husband of the *cestui que trust*, the husband is not competent to prove, on the part of the plaintiff, that the goods have been conveyed to the plaintiff in trust for the separate use of the witness's wife. *Davis v. Dinwoody*, 4 *T. R.* 679. But in an action between third persons, if the evidence of the wife merely tends to expose her husband to a legal demand, or to a charge of felony, she is not incompetent. *Henman v. Dickinson*, 5 *Bing.* 183.; *R. v. Bathwick*, 2 *B. & Ad.* 639. Thus, in an action for goods sold and delivered, a woman is competent to prove that they were sold, not on the credit of the defendant, but of her husband. *Williams v. Johnson*, 1 *Stra.* 504. A widow cannot be asked to disclose conversations between herself and her late husband in order to show an assignment to be fraudulent. *Doker v. Hasler*, *R. & M.* 198. But see *Beveridge v. Minter*, 1 *C. & P.* 364., *semb. contra*. The evidence of a husband or wife, as to matters which occurred while the relation of marriage subsisted, continues inadmissible after the death or divorce of either. *Monroe v. Twissleton*, *Peake Ev. Appendix*. Nor can either be called to prove non-access, or be examined on any point tending to establish it. *R. v. Sourton*, 5 *A. & E.* 180.

Whether a woman, who cohabits with a man as his wife, is on that account an incompetent witness where he is concerned, was at one time a doubtful question. *Campbell v. Twemlow*, 1 *Price*, 81. But in a late case the court of Common Pleas held that a woman who had merely lived with the defendant as his wife, and passed by his name, might be called as a witness for him. *Bathews v. Gafindo*, 4 *Bing.* 610. So a woman whose marriage is void by reason of her having a former husband. *Wells v. Fisher*, 1 *M. & Rob.* 99.

Incompetency from Interest, how removed.

The operation of the late statute, 3 & 4 *W. 4. c. 42.*, as a release, has been already considered; but until its construction has been settled by further decisions, it has been thought proper to insert the former cases on the removal of interest.

The interest of the witness may be divested before trial by payment or release, and his competency will then be restored. Thus a legatee who has been paid before trial is a competent witness to increase the estate. *Clarke v. Gannon*, *R. & M.* 31. So a release from the defendant, the drawer of a bill of exchange, to the acceptor, will render the

latter a competent witness. *Scott v. Lifford*, 1 Camp. 249. In an action against a minor who appears by guardian, a release from the guardian is insufficient; for he has no such power. *Fraser v. Marsh*, 2 Stark. 41. A residuary legatee is not a competent witness, in an action by an executor to recover a debt due to his testator, by releasing all claim to the debt in question; for the residue will be diminished by the payment of costs. *Baker v. Tyrochitt*, 4 Camp. 27. If the witness offers to release or surrender his interest, and executes a release accordingly, his competency is restored, though the other party refuse to accept the release. *Bent v. Baker*, 3 T. R. 35. *Goodtitle v. Welford*, 1 Doug. 139. So if the party, on whose side the witness is interested, makes an offer to remove his interest, and the witness refuses, that will not deprive the party of his testimony. 1 Phill. Ev. 128. A release from one of several joint plaintiffs is sufficient. *Hockless v. Mitchell*, 4 Esp. 86. Where a witness is incompetent on the ground that he has made himself liable to pay the attorney, a release to him by the attorney of "all fees, costs, and charges," is sufficient to restore his competency. *Doe v. Allbutt*, 6 C. & P. 131. A partner or part-owner, not a party to the action, may be rendered competent by a release, or by mutual releases. *Wilson v. Hirst*, 4 B. & Ad. 760. *Jones v. Pritchard*, 2 M. & W. 199. *Beckett v. Wood*, 6 New Ca. 380. *Anté*, p. 120.

Where a joint release is executed by several commoners of their several rights over the same place, it is sufficient, though it have only one stamp, *Carpenter v. Buller*, 2 M. & Rob. 299. See as to stamps on releases, *post*, tit. *Stamps*.

A corporator is not made competent for the corporation by a release to the corporation; for the release is inoperative: he must be disfranchised. *Bailiffs of Godmanchester v. Phillips*, 4 A. & E. 550. A witness, who has subscribed the original deed of a company as a member, is not admissible for them in an action by their trustees, on merely proving a parol agreement to give up his share and to accept a salary as secretary in lieu of it; nor by executing a release of his salary. *Rigby v. Walthew*, 5 Dowd. P. C. 527.

The bail of the defendant may be made competent for him by the defendant's deposing, in the hands of the officer of the court, a sum equal to the sum sworn to and the costs of the action: the judge will then make an order for striking his name off the bail-piece. *Baillie v. Hole*, M. & M. 289; and see *anté*, p. 110. So a witness liable upon a bond to the costs of the action will be allowed to deposit the amount of the penalty of the bond with the officer of the court; and his evidence will then be received. *Lees v. Smith*, 1 M. & Rob. 329.

Incompetency on the ground of professional confidence.

[Who are privileged.] Counsel, (*Curry v. Waller*, 1 Esp. 456.) solicitors and attorneys, cannot be compelled to reveal communications made to them in confidence. *R. v. Duchess of Kingston*, 20 How. St. Tr. 612. A person who acts as interpreter (*Du Barré v. Livette*, Peake, 78.), or as agent (*Parkins v. Hawkshaw*, 2 Stark. 239.) between the attorney and his client; or the attorney's clerk (*Taylor v. Forster*, 2 Car. & P. 195., *R. v. Upper Boddington*, 8 D. & R. 732.), cannot be called upon to reveal a confidential communication. So a barrister's clerk cannot be called to prove his retainer. *Footé v. Haynes*, R. &

M. 165. But a person, who is not an attorney, may be compelled to disclose communications which have been made to him under a mistaken idea that he was an attorney. *Fountain v. Young*, 6 *Esp.* 113.

Where an attorney is employed both by vendor and vendee to draw a conveyance, the draft of which is perused by another attorney on behalf of the vendee, the former attorney will not be allowed to produce the draft of the conveyance against the wishes of a party claiming under the vendee. *Doe v. Seaton*, 2 *A. & E.* 171. And, generally, where two parties employ one and the same attorney, he cannot disclose the title of either. As where a borrower applies for a loan to the attorney of the lender, and delivers him an abstract of title, the attorney cannot afterwards be called against the borrower to prove the abstract delivered. *Doe v. Watkins*, 3 *New Ca.* 421.

Matters communicated to an attorney for the purpose of bringing an action or suit, or relating to an action or suit existing at the time, or contemplated, are privileged from disclosure; *Williams v. Mundie*, *R. & M.* 84; though no suit is actually pending; *Clark v. Clark*, 1 *M. & Rob.* 4. *Cromack v. Hemmick*, 2 *B. & B.* 4. And in chancery it has been held that the protection extends to every communication by the client to his counsel, attorney, or solicitor, with a view to professional assistance, or in a professional capacity. *Walker v. Wildman*, 6 *Madd.* 47. *Greenough v. Gaskell*, 1 *Myl. & K.* 98. And this may now be regarded as the settled rule of law. Therefore, an attorney cannot be called to prove that a lease, shown to him by his client at a professional interview, was then unstamped. *Wheatley v. Williams*, 1 *M. & W.* 533. And where the assignees of a bankrupt brought trover for a lease, they were not permitted to call the solicitor of the bankrupt to shew that it had been deposited with the defendant as a security after the act of bankruptcy. *Turquand v. Knight*, 2 *M. & W.* 98. And it seems that where the attorney is so employed as to give the court a summary jurisdiction over him, his character is confidential within the rule; *per Alderson B.*, *S. C. id.* It is said, too, that a scrivener is on the same footing, at least where he is an attorney also. *S. C.* 100. *Anon. Skinner*, *Rep.* 404. *Lill. Pr. Reg.* 556.

The privilege is that of the client, and not of the attorney; and the court will prevent the attorney, though he be willing, from making the disclosure; *B. N. P.* 284.; *Wilson v. Rastall*, 4 *T. R.* 759.; unless the client waive the privilege, which he may do, at least in cases where the privilege is for his benefit alone; *Merle v. More*, *R. & M.* 390., and see *note ibid.* If the attorney of one of the parties is called by his client, and examined as to a matter which has been the subject of confidential communication, he may be cross-examined as to such matter, though not as to others. *Vaillant v. Dodemead*, 2 *Atk.* 524.

What matters may be disclosed.] Matters not communicated to an attorney in his professional capacity, as if he be undersheriff at the time, must be disclosed. *Wilson v. Rastall*, 4 *T. R.* 753. *Cobden v. Kendrick*, 4 *T. R.* 481. So matters communicated before the retainer. *Cuts v. Pickering*, 1 *Vent.* 197. All matters not confidentially communicated must be disclosed, as well as all matters which the attorney might have known without being intrusted as attorney in the cause; *B. N. P.* 284.; provided the information was obtained by him independently, and not in the course, of his professional employment; see

observations in *Wheatley v. Williams*, 1 M. & W. 540, 541.; and in *Magrath v. Hardy*, 4 New Ca. 782. 795. Thus an attorney may be called to prove a deed executed by his client, which he has attested; *Doe v. Andrews*, Coup. 846.; and when so called, he may be cross-examined as to what passed between him and his client at the time. *Cleve v. Powell*, 1 M. & Rob. 228. So, to prove the contents of a notice to produce, or an erasure in a deed belonging to his client; *B. N. P.* 284.; or the delivery of a particular paper by his client; *Eicke v. Nokes*, M. & M. 304.; or to prove who has employed him to defend the cause; *Levy v. Pope*, M. & M. 410.; or that he is in possession of a particular document belonging to his client so as to let in secondary evidence of its contents after proof of notice to produce it. *Bevan v. Waters*, Id. 235. *Coates v. Mudge*, 1 Dowl. P. C. N. S. 540. So a communication between an attorney and his client relative to a matter of fact only, where the character or office of attorney is not called into action, is not privileged. *Bramwell v. Lucas*, 2 B. & C. 745. See *Rosc. Crim. Ev.* 150-2. The defendant's attorney may be called by the plaintiff to prove admissions made by his client, the defendant, in a conversation between plaintiff and defendant in his presence; though he cannot be allowed to prove such admissions in a conversation between himself and his client. *Griffith v. Davies*, 5 B. & Ad. 502. And where two parties employ the same attorney, a letter by one of them to the attorney, containing an offer to be made to the other, may be given in evidence against the writer of it. *Baugh v. Cradocke*, 1 M. & Rob. 182. In an action for work done as attorney of the defendant, the defendant, in order to shew that plaintiff was retained by B. and not by defendant, may prove admissions made by the plaintiff to the professional agent employed by him to sue out process in an action by B., which action was the work alleged to be done by the plaintiff for the defendant. *Gillard v. Bates*, 6 M. & W. 547. An attorney, professionally employed to prepare an assignment of goods which he declines to make, will not be allowed to disclose the instructions given him; *Cromack v. Heathcote*, 2 B. & B. 4.; nor to prove the contents of deeds or abstracts deposited with him as solicitor. *R. v. Upper Boddington*, 8 D. & R. 732. But if such deeds form no part of his client's title, he is bound to produce them: as where the attorney for the lessor holds a lease, he may be subpoenaed by the lessee to produce it. *Doe v. Thomas*, 9 B. & C. 288. See *anté*, "Production under subpoena duces." p. 102.

Physicians, surgeons, and divines are not privileged from compulsive disclosure of communications, however confidential. *R. v. Duchess of Kingston*, 20 How. St. Tr. 573. *Gilham's case*, 1 Moo. C. C. 186.

Incompetency on the ground of public policy, or an obligation of secrecy.

A witness is not compellable, nor indeed allowed, to reveal communications, the disclosure of which may be injurious to the interest of the state. Thus questions, tending to the discovery of the channels by which a disclosure of treasonable transactions was made to the officers of justice, are not permitted to be asked. *Hardy's case*, 24 How. St. Tr. 814. *R. v. Watson*, 2 Stark. 136. So communications between the governor of a colony and his attorney-general are confidential, and cannot be disclosed. *Wyatt v. Gore*, Holt, 299.; and see *Cooke v. Maxwell*, 2 Stark. 184. So a letter written by an agent of government to one of the secretaries of state. *Anderson v. Hamilton*, 2 B. & B.

156 (n). But this rule is confined to communications made by and between ministers and officers of the government in the discharge of their public duty; and therefore a letter, written by a private individual to the secretary of the post-master general, complaining of the conduct of the guard of a mail, is not privileged from disclosure. *Blake v. Pitfold*, 1 M. & Rob. 198. *Rosc. Crim. Evid.* 147-9.

The oath of secrecy, taken by the clerk of the property tax commissioners, will not exempt him from giving evidence in court. *Lee v. Birrell*, 3 Camp. 336. A grand juror is also compellable, in furtherance of justice, to prove what passed before him. *Anon.* 4 Bl. Com. 126. n. by Christian; *Sykes v. Dunbar*, 2 Selw. N. P. 1004. But see *Tri. per pais*. 335. 12 Vin. Ab. 38. Confidential proceedings at the council board cannot be divulged. *Layer's case*, 16 How. St. Tri. 224. But there are cases to the contrary; see *Rosc. Crim. Evid.* 149, 150.

Privilege of refusing to answer.

We have seen above that there are cases in which witnesses are not permitted to answer certain questions; there are others which parties are permitted to ask, but the witness at his discretion may refuse to answer. Thus, if a question is asked, the answer to which would expose the witness to punishment, or to a criminal charge, (as to convict him of the offence of usury) *Cates v. Hardacre*, 3 Taunt. 424., he cannot be compelled to answer. See the cases collected, 1 Phill. Ev. 262.; *Rosc. Crim. Evid.* 130-2. But the question may be put; at least such appears on the whole to be the weight of authority; *Queen's case*, 2 B. & B. 311.; *Watson's case*, 2 Stark. 153.; see contra, *Cundell v. Pratt*, M. & M. 106., and cases cited, *Rosc. ubi supra*. With regard to questions tending only to criminate, it was said by Lord Eldon that it was the strong inclination of his mind to protect the party, not only against any question that has a direct tendency to criminate him, but that forms one step towards it. *Paxton v. Douglas*, 19 Ves. 227. *Claridge v. Hoare*, 14 Ves. 59. *Swift v. Swift*, 4 Hagg. Eccl. 154. If the time limited for the recovery of the penalty has expired, the witness may be compelled to answer. *Robert v. Allatt*, M. & M. 192. And if a witness answers any questions on a matter rendering him liable to punishment, he cannot afterwards claim his privilege, but must answer throughout; *East v. Chapman*, M. & M. 47.; even though it may affect his life. *Per Dampier J.*, *Anon. Manning's Index*, 336. The objection to such questions must come from the witness and not from the counsel in the cause. *Thomas v. Newton*, M. & M. 48. And the counsel, interested in excluding the evidence, will not be allowed to argue in support of the objection. *R. v. Adey*, 1 M. & Rob. 94.

So a witness cannot be compelled to answer questions which may subject him to a forfeiture of his estate. 1 Phill. Ev. 264. But a witness cannot now legally refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to a penalty or forfeiture of any kind or nature whatsoever, on the ground that the answer may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit. 46 G. 3. c. 37.

A witness is not compellable to answer questions put for the purpose of degrading his character; *Cook's case*, 13 How. St. Tr. 334.; *Freind's case*, 13 How. St. Tr. 17.; *Layer's case*, 16 How. St. Tr. 161.;

though such questions may legally be asked; *R. v. Edwards*, 4 T. R. 440.; *R. v. Holding*, Arch. Cr. Law, 102.; *Cundell v. Pratt*, M. & M. 108. See the cases collected, 1 Phill. Ev. 269. If the witness chooses to answer the question, his answer is conclusive. *Watson's case*, 32 How. St. Tr. 488. 490. See also *Rose v. Blakemore*, R. & M. 383. But where the object of the inquiry is to prove that the witness has endeavoured to corrupt another to give false testimony in the cause, his denial of the fact, or refusal to answer, will not preclude the party from proving it by other evidence. *Queen's case*, 2 B. & B. 311.

Examination of Witnesses.

Ordering witnesses out of court.] During the examination of a witness the court will, in general, on the application of either of the parties, order all the other witnesses in the cause to go out of court. But if the attorney in the cause is a witness, he will in general be suffered to remain, his assistance being necessary to the proper conduct of the cause. *Pomeroy v. Baddeley*, R. & M. 430. It is apprehended, however, that this is a matter for the discretion of the judge. If the witness remains after being ordered to withdraw, it will not necessarily prevent his being examined; it is still in the discretion of the judge to permit the examination or not; *Parker v. McWilliam*, 6 Bing. 683.; *R. v. Colley*, M. & M. 329.; except in the Exchequer, where the witness is peremptorily excluded on trials between the Crown and a subject. *Attorney-General v. Bulpit*, 9 Price, 4. Accord. *Parker v. McWilliam*, 6 Bing. 684.

Leading questions.] It is a general rule that leading questions are inadmissible on the examination of a witness in chief; but questions to which the answer Yes, or No, would not be conclusive, are not in general objectionable. Thus a witness, called to prove that A. and B. are partners, may be asked whether A. has interfered in the business of B.? *Nicholls v. Dowding*, 1 Stark. 81.; for though he may have interfered, he may not be a partner; and *per* Lord Ellenborough (*ibid.*), "I wish that objections to questions, as leading, might be a little better considered before they are made. In general no objections are more frivolous." So where a witness, called to prove the partnership of the plaintiffs, could not recollect their names so as to repeat them without suggestion, but said that he might probably recognise them if suggested, Lord Ellenborough held that the witness might be asked whether certain specified persons were members of the firm. *Acerro v. Petrosi*, 1 Stark. 100. A witness, produced to read or explain a voluminous series of ancient records brought into court, may be asked to state the result of them. *Rouse v. Brenton*, 3 M. & R. 212. Where a witness, on his examination in chief, shows himself decidedly adverse to the party calling him, the judge usually allows the examination to assume the form of a cross-examination; and where the witness stands in a situation which of necessity makes him adverse to the party calling him, the counsel may, as a matter of right, so examine him. *Clarke v. Saffery*, R. & M. 186.; and see *Dickinson v. Shoe*, 4 Esp. 67. At all events the presiding judge has a discretion as to the mode of examination, in order best to answer the purposes of justice; *per* Abbott C. J., in *Bastin v. Carew*, cited R. & M. 127.

Where a witness for the plaintiff, cross-examined as to the con-

tents of a lost letter, swore that it did not contain a certain passage; and a witness was called by the defendant to contradict this statement, Lord Ellenborough ruled that, after exhausting the memory of the latter witness as to the contents of the letter, he might be asked if it contained a particular passage recited to him, which had been sworn to on the other side; for that otherwise it would be impossible ever to come to a direct contradiction. *Courteen v. Touse*, 1 Camp. 43. And where, in cross-examination, a witness, being asked as to some expressions which he had used, denied them, and the counsel on the other side called a person to prove that the witness had used such expressions, and read to him the particular words from his brief, Abbott C. J. held that he was entitled to do so. *Edmonds v. Waller*, 3 Stark. 7. But where a witness denied, on cross-examination, the use of certain expressions by him in a conversation at which both plaintiff and defendant were present, it was held that a witness, called to prove that such expressions were used, could not have the very words suggested to him; for the conversation was evidence in itself, and was not merely proved for the purpose of discrediting the witness. *Hallett v. Cousins*, 2 M. & Rob. 238.

[Cross-examination.] Upon cross-examination, counsel may lead a witness so as to bring him directly to the point as to the answer; but he cannot, if the witness shows a leaning in his favour, go the length of putting into the witness's mouth the very words which he is to echo back again. *Hardy's case*, 24 How. St. Tr. 755. It is not competent to counsel, on cross-examination, to question a witness concerning a fact wholly irrelevant to the matter in issue, for the mere purpose of discrediting him by calling other witnesses to disprove what he says; *Spenceley v. De Willott*, 7 East, 109.; and should the witness answer such a question, evidence cannot be given to contradict him. *Harris v. Tippet*, 2 Camp. 637.; *R. v. Watson*, 2 Stark. 157. Where a witness is brought into court merely for the purpose of producing a written instrument to be proved by another witness, he need not be sworn; and, unless sworn, the other party will not be entitled to cross-examine him. *Autè*, p. 103. And where a person called to produce a document was sworn by mistake and was asked a question which he did not answer, it was held that the opposite party was not entitled to cross-examine him. *Rush v. Smith*, 1 C. M. & R. 94.

A witness cannot properly be asked, on cross-examination, whether he has written such a thing; the right course is to put the writing into his hands, and ask him whether it is his writing. *Queen's case*, 2 B. & B. 293. Nor can he be asked as to the contents of his own affidavit, without putting the original into his hands; per Tindal C. J., recognised in *Bastard v. Smith*, 10 A. & E. 213. If, on cross-examination, a witness admits a letter to be in his handwriting, he cannot be questioned by counsel whether statements, such as they may suggest, are contained in it; but the whole of the letter must be read in evidence. *Queen's case*, 2 B. & B. 266. According to the ordinary rule of proceeding, the letter is to be read as part of the evidence of the cross-examining counsel, after he shall have opened his case; but if the cross-examining counsel suggest to the court that he wishes to have the letter read immediately, in order that he may found certain questions on the contents of that letter which could not be well or

effectually done without reading the letter itself, it may be so read, subject to all the consequences of having it received as part of his evidence. *Id.* 290. A witness on cross-examination may, if he pleases, admit not having mentioned a fact on a former examination, though that examination is in writing and not produced. *Ridley v. Gyde*, 1 *M. & Rob.* 197.

If a wrong witness is called in consequence of a mistake in his name, and is dismissed on the discovery of the mistake, the other side has no right to cross-examine him. *Clifford v. Hunter*, 3 *C. & P.* 16. So if he is called by error of the counsel and actually sworn, yet, if dismissed before examination, he is not liable to be cross-examined. *Wood v. Mackinson*, 2 *M. & Rob.* 273.

It is in the discretion of the judge whether he will permit a witness to be recalled. *Adams v. Bankart*, 1 *C. M. & R.* 681.; *Acc. Queen's case*, 2 *B. & B.* 301.

Re-examination.] A re-examination, which is allowed only for the purpose of explaining any facts which may come out on cross-examination, must be confined to the subject-matter of the cross-examination. The rule with regard to re-examinations is thus laid down by Abbott C. J. in the *Queen's case*, 2 *B. & B.* 297.: "I think the counsel has a right, on re-examination, to ask all questions which may be proper to draw out an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful; and also of the motive by which the witness was induced to use those expressions; but he has no right to go further, and introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness."—"I distinguish between a conversation with a party to a suit, whether criminal or civil, and a conversation with a third person. The conversations of a party to the suit, relative to the subject-matter of the suit, are in themselves evidence against him in the suit; and if a counsel chooses to ask a witness as to any thing which may have been said by an adverse party, the counsel for that party has a right to lay before the court all that was said by his client in the same conversation, not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against the party, without giving the party at the same time the benefit of the entire residue of what he said on the same occasion." The language of Abbott C. J., in the *Queen's case* has however, been qualified by the Court of Q. B. in *Prince v. Samo*, 7 *A. & E.* 627. which decides that a witness, cross-examined as to assertions of the plaintiff in a particular conversation, cannot be re-examined as to other unconnected assertions of the plaintiff in the same conversation, although connected with the subject of the suit. Such partial cross-examination does not necessarily let in the whole conversation.

Where a witness of the plaintiff stated, on cross-examination, facts which were not strictly evidence, but might prejudice the plaintiff, it was held that, unless the defendant applied to strike them out of the judge's notes, the plaintiff was entitled to re-examine upon them, *Blewett v. Tregonning*, 3 *A. & E.* 554.

Credit of witness, how impeached and supported.] In order to impeach the credit of a witness, evidence may be given of statements made by him at variance with his testimony on the trial; but to lay a foundation for the evidence of such contradictory declaration or conversation, the witness must be asked, on cross-examination, whether he has made such declaration, or held such conversation. *Queen's case*, 8 B. & B. 301. Before you can contradict a witness by showing that he has, at some other time, said something inconsistent with his present evidence, you must ask him as to the time, place, and person involved in the supposed contradictions. It is not enough to ask him the general question, whether he has ever said so and so. *Per Tindal C. J.*, *Angus v. Smith*, M. & M. 474. Where the witness merely says that he does not recollect making the statement, evidence to prove that he made the statement has been held inadmissible; there must be an express denial. *Pain v. Beeston*, 1 M. & Rob. 20. Where the object in proving the statements of a witness is not merely to contradict him, but to impeach his moral character by proof of loose and unbecoming language, the evidence seems admissible without previous inquiry of himself. *Carpenter v. Wall*, 11 A. & E. 803. It has been doubted whether, to corroborate the testimony of the witness whose credit has been impeached, evidence is admissible that the witness affirmed the same thing before on other occasions; *Gilb. Ev.* 150.; *B. N. P.* 294.; *Luttrell v. Reynell*, 1 Mod. 283.; but the better opinion is, that such evidence is inadmissible. *R. v. Parker*, 3 Doug. 242. It has been observed that the rule is subject to this exception, that where the counsel on the other side impute a design to misrepresent from some motive of interest or friendship, it may, in order to repel such an imputation, be proper to show that the witness made a similar statement at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of the facts. 1 *Phill. Ev.* 293. So, it is said by Sir W. D. Evans, "If a witness speaks to facts negating the existence of a contract, and insinuations are thrown out that he has a near connexion with the party on whose behalf he appears; or that a change of circumstances has excited an inducement to recede from a deliberate engagement, the proof by unsuspicious testimony that a similar account was given when the contract alleged had every prospect of advantage removes the imputation resulting from the opposite circumstances. . . . Upon an accusation for rape, the disclosure of the fact upon the first proper opportunity after its commission, and the apparent state of mind of the party who has suffered the injury, are always regarded as very material, and the evidence of them is constantly admitted without objection." *Notes to Pothier on Oblig.* vol. ii. p. 251.

If a witness gives evidence contrary to that which the party calling him expects, that party cannot give general evidence to show that the witness is not to be believed on his oath. *Ewer v. Ambrose*, 3 B. & C. 749. And it has been questioned whether it is competent to him to prove that the witness has previously given a different account of the transaction. *Id. ibid.* The point arose in a late case where the plaintiff, having called a witness who gave adverse evidence, showed that he had made a different statement to his attorney previously to the trial. *Denman C. J.*, and *Bolland B.* (Justices of the C. P. at Lancaster,) differed in opinion as to the reception of this evidence. *Wright v. Beckett*,

1 *M. & Rob.* 414. See *R. v. Oldroyd*, *R. & R. C. C.* 88. In *Duan v. Aslett*, 2 *M. & Rob.* 122., Denman C. J. adhered to his opinion of its admissibility. In *Holdsworth v. Mayor of Dartmouth*, Exeter, Sum. A. 1838, MSS., where defendant pleaded fraud to an action on a bond, and called an adverse witness who denied he had ever said the transaction was fraudulent, Parke B. refused to let defendant call other witnesses to prove previous contradictory declarations of the former witness, and said he agreed with Bolland B. in the above case. *S. C.* 2 *M. & Rob.* 153. And this latter ruling has been followed by several other judges. *Winter v. Butt*, *Id.* 357. *Allay v. Hutchings*, *Id.* 358, note (a). At all events, the party may prove the facts denied by other witnesses. *Lowe v. Jolliffe*, 1 *W. Bl.* 365. *Alexander v. Gibson*, 2 *Camp.* 555. *Richardson v. Allan*, 2 *Stark.* 334. In an action upon a policy of insurance against fire, one issue was, "whether or not goods of the plaintiff had been destroyed by fire as alleged in the declaration;" a witness was called for the plaintiff to prove that part of the goods were supplied to the plaintiff by him before the fire; but, on being shown an invoice and letter relating to such goods, he stated that, though they were written by him, he had never delivered such goods to the plaintiff; that the letter, supposed to have been sent from Edinburgh, was written by him in London at the desire of the plaintiff; that the invoice was drawn up by him, the witness, after the fire, in the presence of the plaintiff's son and shopman who persuaded him to state that the goods had been sent according to the invoice and letter. It was held, that the son and shopman, who had already been examined for the plaintiff, might be called back to contradict all these statements. *Friedlander v. London Assurance Company*, 4 *B. & Ad.* 193. Where a party calls other witnesses to contradict his own witness as to a particular fact, the whole of the testimony of the contradicted witness is not therefore to be necessarily repudiated. *Bradley v. Ricardo*, 8 *Bing.* 57.

Opinion of witness when admissible.] In general the opinion of a witness as to any of the facts in issue is inadmissible as evidence, unless upon questions of science. Thus in an action where the question is whether a bank, erected to prevent the overflowing of the sea, has caused the choking up of a harbour, the opinions of scientific men as to the effect of such an embankment upon the harbour are admissible. *Folkes v. Chadd*, 3 *Doug.* 157. And where the question is, whether a seal has been forged, seal engravers may be called to show a difference between a genuine impression and that supposed to be false. *S. C. ibid.* per Lord Mansfield. So a physician, who has not seen the particular patient, may, after hearing the evidence of others at the trial, be called to prove on oath the general effects of the disease described by them, and its probable consequences in the particular case; *Peake Ev.* 208.; or whether the facts proved are symptoms of insanity. *R. v. Searle*, 1 *M. & Rob.* 75. The opinion of a person conversant with the business of insurance, as to whether the communication of particular facts would have varied the terms of insurance, has been admitted in evidence on several occasions both in actions on the policy, and against insurance brokers for negligence; *Berthon v. Loughman*, 2 *Stark.* 258.; *Rickards v. Murdock*, 10 *B. & C.* 527.; *Chapman v. Walton*, 10 *Bing.* 57.; but in *Campbell v. Rickards*, 5 *B. & Ad.* 840., a new trial was granted, because such evidence had been admitted, and it was held that

the materiality of a fact concealed was a question for the jury alone, and that "witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced if the parties had acted in one way rather than another." The evidence of a ship-builder has been admitted on a question of sea-worthiness, though he was not present at the survey. *Thornton v. Royal Exchange Ass. Co.* Peake, 25. A person versed in the laws of a foreign country may give evidence as to what, in his opinion, would be the effect of certain facts, according to the law of that country. *R. v. Wakefield*, printed report, (*Murray's* ed.) p. 238. *Chaurand v. Angerstein*, Peake, 44.

As to calling persons skilled in handwriting to prove forgery or to establish the genuineness of ancient documents, see *anté*, p. 92.

Memorandum to refresh witness's memory.] A witness will be allowed to refer to an entry, or memorandum, made by himself at the time or shortly after the occurrence of the fact to which it relates, in order to refresh his memory; and this though the entry or memorandum would not of itself be evidence; *Kensington v. Inglis*, 8 East, 289.; as a receipt on unstamped paper. *Maugham v. Hubbard*, 8 B. & C. 14. But he cannot refresh his memory by extracts from a book, though made by himself. *Doe v. Perkins*, 3 T. R. 749. Nor by a copy of a book; unless the witness himself saw the copy made and checked it at the time by personal examination, while the subject was fresh in his recollection; for then the copy is, in effect, an original entry by himself. *Burton v. Plummer*, 2 A. & E. 341. So a witness may refresh his memory by reference to entries in a book, which he did not write with his own hand, but which he examined from time to time shortly after the events recorded. *Burrough v. Martin*, 2 Camp. 112. Where a witness, on seeing his initials affixed to an entry of payment, said, "I have no recollection that I received the money; I know nothing but by the book, but seeing my initials I have no doubt that I received the money;" this was held sufficient evidence. *Maugham v. Hubbard*, *suprà*. Acc. *R. v. St. Martin's, Leicester*, 2 A. & E. 210. A printed form of lease, read over to a tenant as the terms of his tenancy but not signed according to Statute of Frauds, may be used to refresh the memory of the witness who read it to him. *Bolton v. Tomlin*, 5 A. & E. 856. If the witness be blind, the paper may be read over to him. *Call v. Howard*, 3 Stark. 4. A witness will not be permitted to refresh his memory from an affidavit, made by him shortly after the fact to be proved, on examination before commissioners of bankrupts. *Smith v. Morgan*, 2 M. & Rob. 257. In that case, Tindal C. J. permitted it to be so far used as to refresh the memory of the witness as to the date of a single transaction, on the authority of *Vaughan v. Martin*, 1 Esp. 440.; but it is observable that in *Vaughan v. Martin*, the whole account of the act of bankruptcy seems to have been read to the witness, a very aged person, who was then asked, "whether the matters there stated were true?"

Where the witness cannot speak without having referred to a book, that book must be produced in court; *Howard v. Canfield*, 5 Dowl. P. C. 417., per Coleridge, J.; and the counsel on the other side has a right to inspect it, without being bound to read it in evidence. *Sinclair v. Stevenson*, 1 C. & P. 582. *R. v. Ramsden*, 2 C. & P. 603. He may

cross-examine upon the entries referred to by the witness ; but if he cross-examines as to other entries in the same book, he makes them part of his own evidence ; *per* Gurney, B., in *Gregory v. Tavernor*, 6 C. & P. 281. Where a paper is put into witness's hand only to prove handwriting and not to refresh his memory, the opposite party is not entitled to see it. *Sinclair v. Stevenson*, *suprà*.

EFFECT OF DOCUMENTARY EVIDENCE.

We have already seen in what manner various written instruments of a public or private nature are to be proved. *Antè*, p. 72., *et seq.* Under the present head will be collected some of the most material cases relating to the effect and authority of such instruments when duly proved, and the circumstances under which they are admissible evidence of the facts which they purport to prove.

Where a document, inadmissible as evidence, has been in part read at the instance of counsel, he cannot afterwards object to the admissibility of the whole of it. *Laybourn v. Crisp*, 4 M. & W. 320.

Effect of Acts of Parliament.

The preamble of a public general act of parliament, reciting the existence of certain outrages, is evidence to prove that fact ; because, in judgment of law, every subject is privy to the making of it. *R. v. Sutton*, 4 M. & S. 532. But it seems that allegations of fact in a public statute are not conclusive ; therefore a place, named as a borough or corporation in the Municipal Reform Act, may be proved not to be one. *R. v. Greene*, 6 A. & E. 548. And a private statute, though it contains a clause requiring it to be judicially noticed as a public one, is not evidence at all against strangers, either of notice, or of any of the facts recited. *Ballard v. Way*, 1 M. & W. 520. *Brett v. Beales*, M. & M. 421. *Taylor v. Parry*, 1 M. & G. 604.

Effect of Proclamations, Gazette, State Papers, &c.

The King's proclamation, being an act of state of which all ought to take notice (*per* Treby C. J., *Wells v. Williams*, 1 Ld. Raym. 283.), is evidence to prove a fact of a public nature recited in it, *viz.* that certain outrages had been committed in different parts of certain counties. *R. v. Sutton*, 4 M. & S. 532.

The Gazette is evidence of all acts of state published therein ; as where it states that certain addresses have been presented to the King, it is evidence to prove that fact. *R. v. Holt*, 5 T. R. 436. So proclamations may be proved by production of the Gazette. *Ibid.* 443. *Att. Gen. v. Theakstone*, 8 Price, 89. But the Gazette is not evidence of matters therein contained which have no reference to acts of state, as a grant by the King to a subject of a tract of land, or of a presentation ; *R. v. Holt*, 5 T. R. 443. ; or of the appointment of an officer to a commission in the army. *Kirwan v. Cockburn*, 5 Esp. 233. *R. v. Gardner*, 2 Camp. 513. So where a declaration for simony alleged the division of a parish into distinct parishes by an order in council under 58 G. 3. c. 45., the Gazette, purporting to contain a copy of such order,

was rejected as evidence of it. *Greenwood q. l. v. Woodham*, 2 *M. & Rob.* 363.

A paper from the secretary of state's office, transmitted by the British Ambassador at a foreign court, and purporting to be a declaration of war by the government of that country against another foreign state, is evidence of the precise period of the commencement of that war. *Thelluson v. Cosling*, 4 *Esp.* 266. The existence of a war between this country and another requires no proof. *Fost. Cr. L.* 219. *R. v. De Berenger*, 3 *M. & S.* 67. The articles of war, printed by the King's printer, are evidence of such articles ; *R. v. Withers*, cited 5 *T. R.* 446. ; of which, it seems, the court will take judicial notice ; *per Abbott C. J.*, *Bradley v. Arthur*, 4 *B. & C.* 304.

Effect of Parliamentary Journals.

The Journal of the House of Lords, containing an address of the Lords to the King, and the King's answer, in which certain differences were stated to exist between the Kings of England and Spain, was admitted to prove the fact of such differences. *R. v. Francklin*, 17 *How. St. Tr.* 637. *R. v. Holt*, 5 *T. R.* 445. But the resolutions of either House of Parliament are not evidence of facts therein stated ; thus the resolution of the House of Commons, stating the existence of the Popish plot, was held to be no evidence of that fact. *Oates's case*, 10 *How. St. Tr.* 1165, 1167.

Effect of Judgments, Verdicts, and other Records.

Effect of judgments in the superior courts, with regard to the parties.]
It is a general principle that a transaction between two parties in a judicial proceeding ought not to bind a third ; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment which he might think erroneous. Therefore the depositions of witnesses in another cause in proof of a fact ; the verdict of a jury finding a fact ; and the judgment of the court on facts so found, although evidence against the parties and all claiming under them, are not in general to be used to the prejudice of strangers. *Per De Grey C. J.*, *Duch. of Kingston's case*, 20 *How. St. Tr.* 538. In order to bind the party he must have sued or been sued in the same character in both suits. Thus in an action by an executor on a bond, he will not be estopped by a judgment in an action brought by him as administrator on the same bond ; but he may show the letters of administration repealed. *Robinson's case*, 5 *Rep.* 32 *b.* In considering the effect of judgments the court will look to the real parties to the suit. Thus a verdict in trespass against a person who justified as servant of J. S., was allowed to be given in evidence against the defendant, who also acted under J. S. ; J. S. being considered the real defendant in both causes. *Kinnersley v. Orpe*, 2 *Doug.* 517. But where, in trespass *q. c. f.*, the defendant pleaded *lib. ten.* in P., and it appeared that P. had sold to plaintiff, and afterwards conveyed, without a covenant of title, to defendant, who had mortgaged to P. ; it was held that P. was competent for the defendant, because the verdict would not be evidence for him as between him and the plaintiff. *Simpson v. Pickering*, 1 *C. M. & R.* 527. A former judgment in ejectment is evidence on another ejectment, where the lessor of

the plaintiff and the defendant are the same. *Doe v. Seaton*, 2 C. M. & R. 728. So a verdict against one defendant, in case for a nuisance, is evidence of the plaintiff's right in a second action against the same and other defendants, if the latter claim under the first defendant. *Strutt v. Bovingdon*, 5 Esp. 58. On a plea of usury to an action on a bond, a verdict of acquittal in an action for penalties for usury on the same bond between the same parties, is admissible for the plaintiff. *Cleve v. Powell*, 1 M. & Rob. 228. In ejectment on the demise of a mortgagee, a verdict and recovery in a former ejectment, brought by the defendant against the mortgagor since the mortgage, is not evidence against the plaintiff. *Doe v. Webber*, 1 A. & E. 119. Evidence of a former judgment is not conclusive, except where it is an estoppel, and is so pleaded. *Outram v. Morewood*, 3 East, 366. *Per* Ld. Ellenborough C. J., *Curtis v. Daniel*, 10 East, 277.

Effect of judgments and verdicts in the superior courts, with regard to privies.] Privies stand in the same situation as to those to whom they are privy. Thus a privy in blood, as an heir, may give in evidence a verdict for, and is bound by a verdict against, his ancestor. Lock v. Norborne, 3 Mod. 141. *Outram v. Morewood*, 3 East, 346. So of privies in estate; therefore, if there be several remainders limited by the same deed, a verdict for one in remainder may be given in evidence for one next in remainder. *Pyke v. Crouch*, 1 Ld. Raym. 730. See *Doe v. Tyler*, 6 Bing. 390. *antè*, p. 108. So a verdict for or against a lessee is said to be evidence for or against him in reversion; *Com. Dig. Bv. (A. 5.)*; *Rushworth v. Lady Pembroke*, Hardr. 472.; but this, as a general rule, seems questionable. A verdict against tenant for life is inadmissible against the reversioner; *B. N. P.* 232.; and it seems that a verdict for or against A. is admissible against a party claiming under A. only where the claim originated since the verdict. *Semb. per* Littledale J., in *Doe v. Earl of Derby*, 1 A. & E. 790. A. and B. sued defendant for diverting water from their works; they were allowed to give in evidence a former recovery by A. alone against the same defendant for a similar injury, although B. had been a witness for A. in the first action; and it was held that the possession by A. and B. of the same works was evidence of privity of estate. *Blakemore v. Glamorgan Canal Co.*, 2 C. M. & R. 133. Privity in law is sufficient; thus a verdict against an intestate, or testator, binds his representatives. *R. v. Hedden*, Andr. 389. In the same manner a judgment against the school-master of a hospital, concerning the rights of his office, is evidence against his successor. *Travis v. Chaloner*, 3 Gwill. 1237. A judgment of ouster against a municipal officer was allowed to be given in evidence *inter alios*, upon issue joined in a *quo warranto* whether he was such officer at the time of defendant's election. *R. v. Hedden*, 2 Stra. 1109. S. C., more fully, in 2 Selw. N. P. 1187. And the record of ouster will be conclusive, if the ouster avoids the election and the judgment was without fraud; *R. v. Mayor of York*, 5 T. R. 66. 72.; otherwise it is not conclusive. 2 Selw. *ubi supra*. *R. v. Grimes*, 5 Burr. 2598.

Effect of judgments or verdicts in the superior courts, with regard to strangers.] There are several exceptions to the general rule, that no one shall be bound by a judgment to which he is not party or privy.

In the case of customs or tolls, verdicts, whether recent or ancient, respecting the same custom or toll are evidence between other parties. *City of London v. Clerke, Carth.* 181., *B. N. P.* 238. So in the case of customary commoners, a verdict in an action for or against one, is evidence for or against another claiming the same right. *Per Lord Kenyon, Reed v. Jackson, 1 East,* 357. So a verdict with regard to a public right of way. *Id.* 355. And it seems that in all cases where general reputation is evidence, a verdict upon the right claimed will also be evidence, even as between strangers to the former record. *Id.* *Ibid.*; *Richards v. Bassett, 10 B. & C.* 663. See further, *anté*, p. 28, 29, 30. The record of a former action of *indebitatus assumpsit* for work and labour by an officer, coupled with parol proof of the point in issue, is evidence of the right to a public office. *Laybourn v. Crisp, 4 M. & W.* 320. The verdict in such cases is not conclusive. *Biddulph v. Ather, 2 Wils.* 23. The decree of an incompetent court, unknown to the law of the realm, is inadmissible, except where the voluntary submission of the parties gives it the effect of an award. *Rogers v. Wood, 2 B. & Ad.* 245. And a prosecution by the Crown for usurping tolls, which was resisted and not carried on to judgment, is not admissible on a trial of the same right. *Per Tindal C. J., Lancum v. Lovell, 6 C. & P.* 437. Where a judgment is produced merely for the purpose of proving the fact that such a judgment has been obtained, and not with a view to prove the facts upon which the judgment was founded, it may be evidence for or against a stranger. Thus, a verdict against a master in an action for the negligence of his servant, is evidence in an action by the master against the servant to prove the amount of damages; *Green v. New River Company, 4 T. R.* 590.; unless the servant's name was indorsed as a witness on the former record. See *anté*, p. 111.

Effect of judgments and verdicts, with regard to the subject-matter of the suit.] A judgment between the same parties, and upon the same cause of action, is conclusive, although the form of action is different. Thus, a verdict in trover is a bar in an action for money had and received, brought for the value of the same goods. *Hitchin v. Campbell, 2 W. Bl.* 827. So a judgment in debt is a bar in an action of assumpsit on the same contract. *Slade's case, 4 Rep.* 94b. So a judgment in trespass, in which the right of property is determined, is a bar to trover for the same taking. *Com. Dig. Action (K 3.)*. If the party mistake his form of action and fail on that account, the judgment in such action will not conclude him. *Ferrers v. Arden, Cro. Elis.* 668., *Godson v. Smith, 2 B. Moore,* 157. If the plaintiff omitted to give any evidence of a demand which he might have recovered in a former action, he will not be precluded from giving it in a subsequent action, provided the form of the issue admits of such evidence. *Seddon v. Tutop, 6 T. R.* 607. And see *Eastmure v. Laws, 5 New Ca.* 444.; *Thorpe v. Cooper, 5 Bing.* 129. So, although an order of removal, quashed at the sessions, is evidence between the same parishes that there is no settlement in the appellant parish, yet the order of sessions may be explained by parol, and a subsequent cause of removal may be shewn. *R. v. Wick, St. Lawrence, 5 B. & Ad.* 526. Where the declaration in the second action is framed in such a manner that the causes of action may be the same as those in the first, it is incumbent on the party bringing the

second action to show that they are not the same. *Lord Bagot v. Williams*, 3 B. & C. 239.

A judgment is only evidence where it is directly upon the point in question. It is not evidence of any matter which came collaterally in question; or of any matter incidentally cognizable; or of any matter to be inferred by argument from the judgment. *Duchess of Kingston's case*, 20 How. St. Tr. 533.; *Blackham's case*, 1 Salk. 290. See the observations of the court in *R. v. Wick*, *St. Lawrence*, *supra*, and *post*, p. 143.

Effect of judgments and verdicts in the superior courts, with regard to the manner in which they are taken advantage of.] A judgment upon the same point between the same parties, will operate as an estoppel, if so pleaded in the second action; but if only offered in evidence, and not so pleaded, it is not conclusive. *Outram v. Morewood*, 3 East, 365.; *Stafford v. Clark*, 2 Bing. 391. Thus, where an action was brought for a nuisance to the plaintiff's mill, it was held that a verdict obtained by the defendant on a former action brought by the plaintiff for the same act, but not pleaded as an estoppel, was not conclusive, but only pregnant evidence; for by declining to plead it, the defendant waives the benefit of the maxim *nemo debet bis vexari, &c.*, and submits the fact of guilt again to a jury. *Vooght v. Winch*, 2 B. & A. 662. The principle is that where the form of pleading refers the case to a jury, they are not estopped. *Per Cur. in Doe v. Huddart*, 2 C. M. & R. 316. 320. The same rule applies to ejectment; therefore a judgment in ejectment is not conclusive of the title in trespass for mesne profits, unless pleaded. *S. C.* See also *Magrath v. Hardy*, 4 New Ca. 782. 797., where it appears that in certain cases, as where an estate or interest arises by estoppel, the jury are bound by it.

Admissibility, in civil cases, of verdicts in criminal cases.] It has been said that a conviction in a court of criminal jurisdiction is evidence of the same fact coming collaterally into controversy in a court of civil jurisdiction. Thus a conviction for bigamy is said to be admissible on an ejectment where the validity of the second marriage is in dispute; *B. N. P.* 245.; and see *Gibb. Ev.* 30. In other cases this evidence has been excluded on the ground that the conviction was procured on the testimony of the party who offers it in evidence. *Smith v. Rummens*, 1 Camp. 9. *Hathaway v. Barrow*, *Id.* 151. But the better opinion seems to be that such a record is inadmissible as *res inter alios*, without reference to the witnesses on whose testimony the conviction was obtained. See the judgment in *Blakemore v. Glamorgan Canal Co.*, 2 C. M. & R. 139. *Brook v. Carpenter*, 3 Bing. 300. *Hillyard v. Grantham*, cited 2 Ves. sen. 246. *Gibson v. McCarty*; *Hardw.* 311. If, on an indictment for an assault, the defendant pleads guilty, the record is said to be evidence against him in an action for damages for the same assault. *Tr. per Pais.* 30. *Anon.* 1 *Phill. Ev.* 320. But the contrary was ruled by Lord Tenterden C. J. at Nisi Prius. 2 *Phill. Ev.* 203. 7th ed.

Where convictions operate *in rem* they are admissible in a suit *inter alios*; see *post*, "*Effect of Judgments in rem*," p. 138.; even though they were obtained on the testimony of the party who gives them in evidence; *per Tindal C. J. Davis v. Nest*, 6 C. & P. 167. See further, "*Effect*

of Convictions," *post*, p. 144. So wherever the fact of conviction is material, as where the object is to prove the incompetency of a witness, the record is, of course, admissible evidence.

Effect of Writs.

The production of a writ, with the sum indorsed, is evidence of the amount for which the arrest was made. *Brown v. Dean*, 5 B. & Ad. 848. A writ superseding a commission of bankruptcy, is evidence both of the fact of the commission and of the date of it as recited, in an action by the assignees. *Gervis v. Grand Western Canal Co.*, 5 M. & S. 76. *Ledbetter v. Salt*, 4 Bing. 623. 626.

Effect of Inquisitions, &c.

Although an inquisition taken before the coroner *super visum corporis* was formerly considered conclusive evidence of the fact found by it against the executors or administrators of the deceased; 3 Inst. 55., it is now held that every thing done under it is traversable. *Per Cur.* in *Garnett v. Ferrand*, 6 B. & C. 611., 1 Saund. 362. n. (1).

An inquisition finding lunacy is evidence of it against third persons, though not conclusive. *Sergeson v. Sealey*, 2 Atk. 412. *Faulder v. Silk*, 3 Camp. 126. *Frank v. Frank*, 2 M. & Rob. 315, 316. n. (a). So inquests of office duly taken under legal commissions, are evidence between third parties. Thus, inquisitions *post mortem* are admissible evidence of the facts found by them; and if the originals are lost, they may be proved by a recital of them in the proceedings on a petition of right in the *Coram rege* roll. *Rowe v. Brenton*, 3 M. & R. 141, 142. An inquisition *post mortem*, reciting a conveyance in *hæc verba*, is evidence of it for a party who claims title under it. *Burridge v. Earl of Sussex*, 2 Ld. Raym. 1292. Accord. *per* Parke B., in *Wood v. Morewood*, *Derby Sum. Ass.* 1841. So an extent of Crown lands in the Exchequer, taken in pursuance of 4 Ed. 1. stat. 1., is evidence; *Rowe v. Brenton*, 3 M. & R. 164. So the returns of inquisitions taken by special commission, *temp.* Ed. 1. called the Hundred Rolls. *S. C.* Id. 140. But a survey of a manor of the Duchy of Lancaster, professing to be made *temp.* Eliz. by the direction of the surveyor general, by the oaths and presentment of certain tenants of the manor, is not evidence of the boundary of the manor in behalf of the owner of it; such survey not being shown to have been taken under any statute or other sufficient authority. *Evans v. Taylor*, 7 A. & E. 617.

An inquisition under a commission from the Court of Exchequer to inquire whether a prior, or the Crown after the dissolution of the priory, was seised of certain lands as parcel of a manor, was held to be admissible, but not *conclusive* evidence of the facts stated in the return. *Tooker v. Duke of Beaufort*, 1 Burr. 146., *Sayer*, 297. So the surveys of the Church and Crown lands, taken by commissioners under the authority of parliament during the commonwealth, are admissible in evidence. *Underhill v. Durham*, 2 Gwill. 542. *Rowe v. Brenton*, 3 M. & R. 359.

The *valor beneficiorum*, or Pope Nicholas's taxation, is a document of the same nature, and is admissible to prove the rate and value at which the persons employed in that taxation thought fit, at that time, to estimate ecclesiastical benefices. *Bullen v. Michel*, 2 Price, 477.

But it is of no value to show whether tithes were then taken in kind or by a modus. *Short v. Lee*, 2 J. & W. 486. 2 *Eagle on Tithes*, 409. 418. A new *valor beneficiorum* was made, 26 Hen. 8., by virtue of commissions under the Great seal, and the surveys under these commissions are admissible to prove the value of the first fruits and tenths of ecclesiastical promotions at that period, though they are not conclusive. *Drake v. Smyth*, 5 Price, 377. *Bullen v. Michel*, 4 Dow. Parl. Ca. 324.

Domesday-book, being a record compiled by the authority of the government, and founded on official returns made *temp. W. 1.* is admissible evidence of the tenure of land, &c. ; and where a question arises whether a manor is ancient demesne, the trial is by inspection of Domesday. *Gilb. Ev.* 76.

On account of the interest of the Crown in the Duchy of Cornwall, records of acts affecting the possessions of it are considered as of a public nature ; and on this ground a document purporting to be a caption of seisin, to the use of the duke, by persons assigned by his letters patent to take seisin, found in the proper repository of such a record, and enumerating the possessions of which seisin was then given to the Black Prince, was admitted as evidence not only of seisin, but also of what things the prince had seisin. *Rowe v. Brenton*, 8 B. & C. 743. *S. C.* 3 M. & R. 156.

An inquisition by a sheriff's jury, to ascertain the value of property for the information of the sheriff, is not, at it seems, admissible evidence of property against the sheriff ; *Lalkew v. Eamer*, 2 H. Bl. 437. ; nor is it evidence in his favour ; *Glossop v. Pole*, 3 M. & S. 175. ; unless, perhaps, the question be, whether the sheriff has acted maliciously. *Id.* 177.

Effect of Rules of Court.

The allegation of a fact in a rule nisi is not evidence of the fact for the party at whose suggestion it is obtained. *Woodroffe v. Williams*, 6 Taunt. 19. A rule, making a judge's order a rule of court, is evidence of the order. *Still v. Halford*, 4 Camp. 17. Rules of court, purporting to be granted on the motion of a certain counsel, have been admitted as evidence of the attendance of such counsel in court at the date of the rules, so as to contradict the statement of a witness that the counsel was at a distant place at that date. *Heath's case*, 16 How. St. Tr. 176. An allegation in a count, that defendant procured a defective security which was set aside by a rule of court, is not proved by merely producing the rule without other proof of the security. *Compton v. Chandless*, 4 Esp. 18.

Effect of Judgments in rem.

A judgment of condemnation of goods in the Court of Exchequer, upon a proceeding *in rem*, is conclusive as to all the world ; and, therefore, after such judgment, trespass will not lie against the officer who seized the goods, to try the point again. *Scott v. Shearman*, 2 W. Bl. 977. But if the proceeding was *in personam* merely, as a conviction for penalties, and not *in rem*, the judgment is not evidence (except of the fact of conviction) in any case in which the parties are different. *Hart v. McNamara*, 4 Price, 154. (n) ; see *anté*, p. 136. The judgment of commissioners of excise, on an information for an offence against an excise law, is conclusive ; *Fuller v. Foteh, Carth.* 346. ; and

binds a stranger; *Roberts v. Fortune*, *Harg. Law Tracts*, 468. (s). But see *Henshaw v. Pleasance*, 2 W. Bl. 1174. It has been said that an acquittal in the Court of Exchequer, upon a seizure made for want of a permit, is conclusive evidence, in an action of trespass, that the permit was regular; per Lord Kenyon, *Cooke v. Sholl*, 5 T. R. 255.; *Vin. Ab. Evid.* (A. b. 23.); but this opinion has, with reason, been questioned; for the acquittal does not, like a conviction, ascertain any precise fact, and may have proceeded on the ground of insufficient evidence. 1 *Phil. Ev.* 338. A conviction *in rem* is evidence as between strangers, though obtained by the evidence of the very party who uses it. *Davis v. Nest*, 6 C. & P. 167.

Effect of Proceedings in Equity.

Bill in Chancery.] It has been laid down in some books that a bill in Chancery is evidence against the complainant, and amounts to an admission. *B. N. P.* 235. *Snow v. Phillips*, 1 Sid. 221. But it has been since held, that a bill in Chancery is not generally admissible in evidence, further than to show that such a bill did exist, and that certain facts were in issue between the parties. *Doe v. Sybourn*, 7 T. R. 3. *Ferrers v. Shirley*, *Fitzg.* 197. In the *Banbury Peerage case*, 2 *Schw. N. P.* 714., to a question whether a bill in Chancery can ever be received in evidence in a court of law to prove any facts either alleged or denied in such bill, the judges answered that, generally speaking, a bill in Chancery cannot be received in evidence in a court of law to prove any fact either alleged or denied in such bill. But whether any possible case might be put, which would form an exception to such general rule, the judges could not undertake to say. At all events a bill in equity cannot be received as evidence against a party not claiming in any manner under either the plaintiff or defendant in the Chancery suit. *Ibid.* In a case in which the plaintiff gave in evidence the answer of defendant to a bill in equity filed by a third party, Tindal C. J. ruled that the defendant was entitled to have the bill also read, as explanatory of the answer and as part of the plaintiff's case; but he cautioned the jury not to consider the statements in the bill as evidence of the facts stated. *Pennell v. Meyer*, 2 M. & R. 98.

Answer.] An answer in Chancery is good evidence against the defendant as an admission on oath, and must all be taken together. Therefore, if, upon exceptions taken, a second answer has been put in, the defendant may insist upon having that also read. *B. N. P.* 237. Where one party reads part of the answer of the other party in evidence, he makes the whole admissible only so far as to waive any objection to the competency of the testimony of the party making the answer, and he does not thereby admit, as evidence, facts which may happen to be stated in it by way of hearsay only; *obiter per* Chambre J., *Roe v. Ferrers*, 2 B. & P. 548.; but this point does not appear to have been judicially decided. See note *ib.*, and *ante*, "Admissions," p. 50.

The answer of a guardian is no evidence against an infant; nor the answer of a trustee against a *cestui que trust*. *B. N. P.* 237., *ante*, p. 41. But an answer will be evidence against privies; thus an answer in a suit for tithes instituted by a vicar against the owners of lands in the parish, in which answer the defendants declared the tithes to belong to the rector, will be evidence in an action for tithes by a succeeding

rector against owners of the same lands. *Dartmouth v. Roberts*, 16 East, 334., *antè*, p. 36. An answer by one who has sold an advowson, filed after the conveyance, is not admissible against a party claiming under the grant. *Gully v. Bishop of Exeter*, 5 Bing. 171. The answer of one defendant is not evidence against a co-defendant; *Wyck v. Meal*, 3 P. Wms. 311.; but after evidence has been given to connect two persons as partners, the answer of one will be evidence against the other. *Grant v. Jackson, Peake*, 203. See further, tit. "Admissions," *antè*, p. 41.

Decree or order.] A decree in Chancery may be given in evidence between the same parties, or any claiming under them. *B. N. P.* 243. It is even evidence as against parties not privy to it for some purposes; thus, on a trial touching the title to land, decrees between former litigants are admitted for the defendant to shew how, and in what character, he came into possession under them, although the plaintiff does not claim under any party to the Equity suits. *Davies v. Lowndes*, 1 New Ca. 606. *S. C.* 5 New Ca. 163. So it is evidence where hearsay is admissible: thus a decree in favour of a public officer, founded on an issue, is evidence of the right to exercise the office; and by such evidence the deputy oyster meters of London established their exclusive rights within the port of London. *Laybourn v. Crisp*, 4 M. & W. 320. But an interlocutory order, made to quiet possession *pendente lite*, is not evidence of reputation. *Pim v. Curell*, 6 M. & W. 234. The decree of an unauthorised court of Equity is inadmissible either as an award (for want of submission), or as reputation. *Rogers v. Wood*, 2 B. & Ad. 245. See *antè*, pp. 29, 30. An order for an attachment for non-payment of the costs in a suit in equity is in itself *prima facie* evidence that a suit has been pending. *Blower v. Hollis*, 1 C. & M. 393.

Effect of Depositions.

Depositions in Chancery may be given in evidence in an action at law on the same matter between the same parties or their privies, where the witness is dead, or cannot be found. *B. N. P.* 239. But they are not evidence of the facts contained in them, against a person who does not claim under the plaintiff or defendant in the Chancery suit. *Ibid.* and *Banbury Peccage case*, cited 1 M. & R. 667. See further, tit. "Hearsay," *antè*, pp. 27, 28. Depositions relating to a question of custom or tolls, upon which hearsay would be good evidence, may be read against a person who was no party to the former suit. *B. N. P.* 239., *antè*, p. 28. So a deposition, taken in a cause between other parties, will be admitted to be read to contradict what the same witness swears at a trial. *B. N. P.* 240. And it will, of course, be evidence in any cause against the deponent himself. The deposition of a witness, taken to perpetuate memory, is not admissible merely because he has since become interested; for it is taken only to prevent the loss of his testimony by death. *Tilley's case*, 1 Salt. 286. See further as to depositions taken on bills to perpetuate testimony, and examinations *de bene esse*, *antè*, p. 78. On an issue to try the *bona fides* of a conveyance, plaintiff cannot give in evidence a deposition, merely because it had been filed by the defendant in a Chancery suit brought by another person against him to try the same question. *Atkins v. Humphreys*, 1 M. & Rob. 523. And see *Humphreys v. Pensam*, 1 Myl. & Cra. 580. But where the defendant (a sheriff) had used an affidavit of his officer

on an interpleader rule, such affidavit was allowed to be given in evidence against him, though the officer was present in court and was not called. *Brickell v. Hulse*, 7 A. & E. 455. So where a petitioning creditor sent his agent to prove an act of bankruptcy, the deposition then made by the agent was admitted as evidence of the act of bankruptcy against his principal. *Gardner v. Moult*, 10 A. & E. 464. In trespass q. c. f., defendant denied the possession of the plaintiff, and put in evidence the examination of A. B., a living witness, who had been called by the plaintiff to prove possession in a previous summary proceeding for malicious trespass by plaintiff against defendant. On such examination, A. B. denied the plaintiff's possession. Held that the deposition was admissible. *Cole v. Hadley*, 11 A. & E. 807. This case is shortly reported, and the grounds of the judgment do not distinctly appear.

It is laid down as a rule that depositions taken in a court not of record, as the Ecclesiastical courts, are not admissible; *B. N. P.* 242.; but this is at variance with the above cases on the admissibility of depositions in Chancery. Even a voluntary deposition may be evidence, as an admission of the party making it, on mere proof of signature. *B. N. P.* 238. Where depositions are tendered in evidence in lieu of the parol testimony of the deponent, they are admissible on the same footing as the parol declarations of witnesses in a former trial: as to which, see *ante*, p. 34. The parties and point in issue must be substantially the same, and there must be an opportunity of cross-examination. *Att. Gen. v. Davison*, *M'Cl. & Y.* 160.

Effect of Sentences in the Ecclesiastical Courts.

The Ecclesiastical Courts having the exclusive right of deciding directly upon the legality of marriage, the temporal courts receive their sentences upon such questions as conclusive evidence of the fact; *Bunting v. Lepingwell*, 4 Rep. 29 a.; upon the principle that the judgment of a court of exclusive jurisdiction, directly upon the point, is conclusive upon the same matter coming incidentally in question in another court for a different purpose, unless impeached for fraud. *Duchess of Kingston's case*, 20 How. St. Tr. 538. 540. See the cases cited, *arguendo*, in *Stockdale v. Hansard*, 9 A. & E. 62. So a sentence, in a suit of jactitation of marriage, is evidence in an action in a court of common law to disprove the marriage. *Jones v. Bow*, *Carth.* 225. In the last mentioned case such sentence was held to be *conclusive* evidence; but on this point the authority of the decision has been overruled; for a sentence in a suit of jactitation has only a negative and qualified effect, *viz.* that the party has failed in his proof; leaving it open to new proofs of the same marriage in the same cause; and does not conclude even the court which pronounces it. *Duchess of Kingston's case*, 20 How. St. Tr. 543. And see *Blackham's case*, 1 Salk. 290. and *Harg. Law. Tr.* 451.

Effect of Probate and Letters of Administration.

The Ecclesiastical Courts have the exclusive right of deciding directly on the validity of wills of personalty, and on the granting of administration. *Noell v. Wells*, 1 Lev. 235. A probate therefore, granted by a competent court, is conclusive of the validity and contents of a will and the appointment of executors, till it be repealed; and no court of common law can admit evidence to impeach it. *Allen v. Dundas*, 3 T. R. 125. On this ground the payment of money to an executor, who has

obtained a probate of a forged will, is a discharge to the debtor of the intestate, though the probate be afterwards declared null. *Id. Ibid.* See *Harg. Law Tracts*, 459. But letters of administration are not evidence of any fact which is matter of inference, and not of adjudication; as the intestate's death. *Thompson v. Donaldson*, 3 *Esp.* 63.; accord. *Moons. v. De Bernales*, 1 *Russ.* 301. Though it cannot be shown in a court of common law, that the Ecclesiastical Court has erred in granting probate, yet evidence may be given to shew that the court had no jurisdiction; as that there were no *bona notabilia* within its jurisdiction. *B. N. P.* 247. Or that the supposed intestate is alive. *Allen v. Dundas*, 3 *T. R.* 130. So the letters of administration may be proved to be revoked; for this is in affirmance of the proceedings of the Spiritual court. *B. N. P.* 247. And the books of the Prerogative Office are evidence of the revocation. *R. v. Ramsbottom*, 1 *Leach*, *C. C.* 25 n. So it may be shown that the seal of the ordinary has been forged; but it cannot be shown that the will was forged; or that the testator was *non compos mentis*; or that another person was appointed executor. *B. N. P.* 247. *Noell v. Wells*, 1 *Lev.* 236. For those questions are settled by the judgment of the Ecclesiastical Court.

A probate, we have seen, is no evidence of a will of real property, *antè*, p. 95. It is said not even to be secondary evidence; *Doe v. Calvert*, 2 *Camp.* 389.; nor is it evidence that an instrument is a will, so as to pass copyhold or customary estates; *Hume v. Rundell*, *Madd. & Geld.* 331; or to operate as an execution of a power to charge land. *S. C. ib.* 331.

In an action for money had and received by defendant's testator, the original will, indorsed as that of which defendant had taken probate, is evidence as against the defendant of an admission by his testator, without calling the attesting witness, or proving the handwriting; notice having been given to produce the probate. *Gorton v. Dyson*, 1 *B. & B.* 219. In this case the will was considered good as secondary, if not as original, evidence.

Effect of Sentences in Admiralty Courts.

Upon questions of prize the Court of Admiralty has exclusive jurisdiction; therefore a sentence of condemnation in that court is conclusive, and, being a proceeding *in rem*, it binds all the world. *Kinnersley v. Chase*, *Park Ins.* 490. 6th ed. And the sentence of a foreign Court of Admiralty is also, by the comity of nations, held to be conclusive upon the same question arising in this country. *Hughes v. Cornelius*, 2 *Shov.* 232.; *Bolton v. Gladstone*, 5 *East*, 160. But the sentence of a Court of Admiralty, sitting in contravention of the law of nations, will not be recognised in our courts. *Havelock v. Rockwood*, 8 *T. R.* 268. If the property is condemned on the ground of its not being neutral, the sentence is conclusive evidence of that fact. *Barzillay v. Lewis*, *Park Ins.* 469., 6th ed. So where no special ground is stated, but the ship is condemned generally as good and lawful prize, it is to be presumed that the sentence proceeded on the ground of property belonging to an enemy, and the sentence will be conclusive evidence of that fact. *Salonci v. Woodmass*, *Park Ins.* 471.; *S. C.* 3 *Doug.* 345. But where there is some ambiguity in the sentence of a foreign Court of Admiralty, so that the precise ground of the determination cannot be collected, the courts here may examine the ground

on which the sentence proceeded. *Bernardi v. Mottoux*, 2 Doug. 574.; *Iothian v. Henderson*, 3 B. & P. 525. And if the condemnation does not plainly proceed upon the ground of enemies' property, or of the ship not having complied with subsisting treaties between her own country and that of the capturing power, but on the ground of regulations arbitrarily imposed by the latter, to which neither the government of the captured ship nor the other powers of Europe have been made parties, such a condemnation will not be admitted as conclusive of a breach of warranty of neutrality. *Pollard v. Bell*, 8 T. R. 444., and cases collected in *Park Ins.* 532. (7th ed.) In order to conclude the parties from contesting the ground of condemnation, such ground must appear clearly upon the face of the sentence; it must not be collected by inference only, or left in uncertainty whether the ship was condemned upon one ground which would be a just ground of condemnation by the laws of nations, or upon another ground which would amount only to a breach of the municipal regulations of the condemning country. *Per Tindal C. J.*, *Dalglish v. Hodgson*, 7 Bing. 504.

Effect of Judgments of Inferior Courts.

It would seem, upon principle, that the final judgment of a competent inferior court, whether of record or not, ought to be conclusive between the same parties upon the same subject-matter, where properly relied on. *Moses v. Macferlan*, 2 Burr. 1009.; *Galbraith v. Neville*, 1 Doug. 6. (s). And see the observations in 1 Stark. Ev. 228. (2d ed.) So it has been held that a certificate from commissioners under an act for settling the debts of the army, stating the sum due from the defendant to the plaintiff, is conclusive in an action brought to recover the money. *Moody v. Thurston*, 1 Stra. 481. See *Attorney-General v. Davison*, 1 M. Cl. & Y. 160. It has, however, been said, that inferior courts, not of record, have not the privilege of not having their judgments controverted in an action brought in a superior court to enforce them; but are only *prima facie* evidence. *Per Lord Mansfield*, *Walker v. Witter*, 1 Doug. 3.

The judgment of an inferior court may always be avoided by proof that the cause of action did not arise within its jurisdiction; *Herbert v. Cook*, 3 Doug. 101.; *S. C. Willes*, 36. (s); *Briscoe v. Stephens*, 2 Bing. 213.; or that defendant, the debtor, against whom the inferior court awarded process, did not reside within the district; *Carratt v. Morley*, 1 A. & E. N. S. 18.; it not appearing, nor being alleged, that any proof of residence had been, in fact, given in the court below. So Lord Ellenborough ruled, that the judgment of the Lord Mayor's Court was *prima facie* evidence that the debt arose within the city; but that, being the record of an inferior court, the defendant might prove the contrary. *Hueham v. Smith*, 2 Camp. 19. And it has been held by the Court of King's Bench, that a judgment of the county court is examinable, and that the existence of the facts necessary to the regularity of such judgment is a question for the jury, although a motion made in the county court to set aside the proceedings for irregularity had been dismissed. *Thompson v. Blackhurst*, 1 Nev. & M. 266. But where trespass was brought for executing a warrant to levy a poor-rate, the plaintiff was not permitted to impugn the appointment of the overseers on the ground of irregularity, or miscalculation of votes at the meeting of justices at

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which the appointment was made ; the jury having expressly negatived fraud. *Penney v. Slade*, 5 New Ca. 319.

Where a cause is removed by *habeas* from an inferior court after a judgment by default, that judgment is not evidence against the defendant in the superior court. *Bollings v. Firby*, 9 B. & C. 782.

Effect of Convictions.

It is a general rule, that the judgments of all courts of competent judicature are conclusive for the purpose of protecting their judicial officers acting within the scope of their authority. Thus where justices of the peace have an authority given to them by act of parliament, and they appear to have acted within the jurisdiction so given, and to have done all that they are required by the act to do in order to originate their jurisdiction, a conviction, drawn up in due form and remaining in force, is a protection in any action brought against them for the act so done. *Per Abbot C. J. Basten v. Carew*, 3 B. & C. 653. Therefore, where, in trespass against two magistrates for giving the plaintiff's landlord possession of a farm as deserted, the defendants produced in evidence a record of their proceedings under the stat. 11 G. 2. c. 19. s. 16., which set forth all circumstances necessary to give them jurisdiction, and by which it appeared that they had pursued the directions of the statute, it was held that this record was not traversable, and was a conclusive answer to the action. *Ibid.* So in trespass against magistrates for taking and detaining a vessel, a conviction by them, under the bum-boat act, is conclusive evidence that the vessel in question is a boat within the meaning of the act. *Brittain v. Kinnaird*, 1 B. & B. 432., see *post*, tit. "*Actions against Justices. Defence.*" In like manner a conviction for a contempt, by commissioners of a court of requests, is conclusive for them in an action of trespass against them ; and the plaintiff cannot controvert the fact of contempt, though unnecessarily alleged in the plea. *Aldridge v. Haines*, 2 B. & Ad. 395. But a want of jurisdiction in the commissioners may be shewn. *Andrews v. Marria*, 1 A. & E. N. S. 3.

Effect of Sentences of Visitors, &c.

The sentence of expulsion of a member of a college by the master and fellows, is conclusive, and cannot be impeached in a court of law. *R. v. Grundon, Coup.* 315. A sentence of deprivation by a visitor of a college, is in the same manner conclusive, and the grounds of it not examinable in any court. *Philips v. Bury*, 1 Ld. Raym. 5. ; S. C. 2 T. R. 346. See *Harg. Law Tracts*, 464, 465. So in ejectment against a schoolmaster who had been removed by sentence of the trustees of the school (such power being vested in them) for misbehaviour, it was held that it was not necessary for the lessors of the plaintiff to prove the grounds of the sentence, and that it was not competent for the defendant to disprove them. *Doe v. Haddon*, 3 Doug. 310.

Effect of Judgments of Foreign Courts.

The sentence of a foreign court of competent jurisdiction, directly deciding a question cognizable by the law of the country, seems to be conclusive here, if the same question arises incidentally between the same parties, provided the sentence be conclusive by the law of the foreign country. *Roach v. Garvan*, 1 Ves. sen. 159. *Burrows v. Jemimo*,

2 *Stra.* 733. *Stafford v. Clark*, 2 *Bing.* 380. Thus in an action on a covenant to indemnify the plaintiff from all debts due from the late partnership of plaintiff, defendant, and another, and from all suits, &c., proof of the proceedings in a foreign court in a suit there instituted against the late partners for the recovery of a partnership debt, in which suit a decree passed against them for want of answer, *per quod* the plaintiff was obliged to pay the debt, is conclusive against the defendant, who will not be permitted to show that the proceedings were erroneous. *Tarleton v. Tarleton*, 4 *M. & S.* 20. But if it appears on the face of the foreign proceedings that the judgment is founded in injustice, as that the defendant has never been summoned, in which case the court could have no jurisdiction, the judgment will not be conclusive, and the courts here will not give effect to it; *Buchanan v. Rucker*, 9 *East*, 192. *S. C.* 1 *Camp.* 63., *Cavan v. Stewart*, 1 *Stark.* 525.; and a judgment in the superior courts of Ireland may be impeached on the same ground. *Ferguson v. Mahon*, 11 *A. & E.* 179. So, where the judges in the foreign court were interested parties; *Price v. Dewhurst*, 8 *Sim.* 279. But it is otherwise where the proceedings have (according to the law of the foreign country) been served upon a public officer in the absence of the defendant. *Becquet v. Mac Carthy*, 2 *B. & Ad.* 954.; and see *Cowan v. Braidwood*, 1 *M. & G.* 882. In order to render the judgment of a foreign court binding in this country, it must appear that it was final and conclusive in the foreign court in which it was given; *Plummer v. Woodburne*, 4 *B. & C.* 637.; and that the parties were within its jurisdiction; *Obicini v. Bligh*, 8 *Bing.* 335. The judgment of a foreign court will not be regarded where it appears on the face of it to be founded on a misapprehension of English law. *Novelli v. Rossi*, 2 *B. & Ad.* 757.

Whether, in an action of debt or assumpsit brought in this country upon a foreign judgment, such judgment is to be considered only as *prima facie* evidence of the debt, and its grounds liable to re-examination; or is to be taken as conclusive and binding on both parties; is a question on which some difference of opinion has prevailed. See *Guinness v. Carroll*, 1 *B. & Ad.* 459. *Martin v. Nicolls*, 3 *Simons*, 458. *Houlditch v. Donegal*, 8 *Bligh N. S.* 301. *Story's Conflict of Laws*, 504—508. The judgment has been held to be conclusive when properly pleaded in bar, though it may be otherwise when attempted to be enforced by an action, or only offered in evidence. *Per Eyre C.J.* in *Philips v. Hunter*, 2 *H. Bl.* 410. *Burrows v. Jemino*, 2 *Stra.* 733. *Plummer v. Woodburne*, 4 *B. & C.* 625. *Smith v. Nicolls*, 5 *New Ca.* 208. In *Ferguson v. Mahon*, 11 *A. & E.* 179. the court considered a judgment in the C. P. of Ireland as conclusive in an action brought upon it, so far as regarded the merits or the propriety of the decision; though liable to be contested on the ground of defect of jurisdiction; as, by showing that the defendant was never before the court. In this respect an Irish and a foreign judgment stand on the same footing. *Harris v. Saunders*, 4 *B. & C.* 411.

The certificate of a vice-consul has been compared to a foreign judgment; but it will not be admitted as evidence of the facts stated in it. Thus the certificate of a British vice-consul in a foreign country is not admissible to prove the amount of a sale; though, by the law of that country, he is constituted general agent for all absent owners of goods, and is authorised and compelled to make the sale in question.

Waldron v. Coombe, 3 Taunt. 162. *post*, p. 149. See *antè*, "*Effect of Sentences in Admiralty Courts*," p. 142.

Effect of Court Rolls and Manor Books.

Court rolls, whether of a court baron or customary court, are evidence as well between the lord of the manor and his tenants or copyholders (*B. N. P.* 247.), as against them. *Attorney-General v. Holtham*, 1 Turn. 217. An ancient customary, not properly a court roll nor signed by any of the tenants, but found among the rolls and delivered down from steward to steward, purporting to have been made *assensu omnium tenentium*, has been admitted as evidence to prove the course of descent within a manor. *Denn v. Spray*, 1 T. R. 466. So a presentment by the homage on the court rolls of a manor, stating the mode of descent of lands in the manor, is evidence of such mode, though no instance of any person having taken according to it be proved. *Roe v. Parker*, 5 T. R. 26. So entries of admissions *durante castâ virginitate* are evidence of a custom to hold on that condition, though there may be no instance of a forfeiture for incontinence. *Doe v. Askew*, 10 East, 520. An entry of an admission, reciting a previous surrender to the use of a will, is evidence of the surrender, the latter being lost, in proof of a settlement by estate. *R. v. Thruscross*, 1 A. & E. 126. In an action by a copyholder against a freeholder of a manor, an ancient parchment writing preserved among the muniments of a manor, purporting to be signed by certain copyholders of the manor, was held to be evidence, as against the plaintiff, of the reputation of the manor as to a prescriptive right of common set up by him. *Chapman v. Cowlan*, 13 East, 10. The court rolls are evidence of proclamations before seizure of a forfeited copyhold, though tendered on behalf of a party claiming under the lord after seizure. *Doe v. Hellier*, 3 T. R. 164. A presentment of a jury at a manor court, setting forth the bounds of the manor, is admissible evidence of the bounds, though mutilated in a part, such part not being apparently connected with the subject of boundary. *Evans v. Rees*, 10 A. & E. 151.

Entries of amercements on court rolls are not in general evidence of title without proof of payment. *Rowe v. Brenton*, 3 M. & R. 302. So entries of fines assessed, in the books of a deceased steward, are not evidence of a custom to take such fines, unless there be some proof of payment. *Dean of Ely v. Caldecott*, 7 Bing. 433. Presentments are not evidence of matters not within the jurisdiction of the homage; as a presentment by the freeholders of the right of common enjoyed by the owner of a certain farm. *Richards v. Bassett*, 10 B. & C. 657.

Effect of Public Books and Public Documents.

Public books and documents are in many instances evidence, even as between strangers, of the facts therein recorded. Thus the register of the Navy Office, with proof of the usage to mark all persons dead with the letters *dd.*, has been admitted to prove the death of a sailor. *B. N. P.* 249. So the books of the Sick and Hurt Office, made up from returns of the King's ships, and kept by a public officer under the Admiralty, are evidence of the death of a sailor. *Wallace v. Cook*,

5 *Esp.* 117. The book at Lloyd's, stating the capture of a ship, is said to be evidence of such capture in an action on a policy; but it is not evidence of notice of the loss, unless to a person who is a subscriber to Lloyd's and in the habit of examining the books there. *Abel v. Potts*, 3 *Esp.* 242. And a certificate by an agent of Lloyd's is not evidence of the amount of damage even against a subscriber. *Drake v. Marryat*, 1 *B. & C.* 473. The log-book of a man-of-war is evidence to prove the time of a vessel sailing under its convoy, in an action on a policy upon such vessel. *D'Israeli v. Jowett*, 1 *Esp.* 427. Such log-book, however, is only evidence when produced as an official public book from the Admiralty; *Rundle v. Beaumont*, 4 *Bing.* 537.; otherwise it can only be used to refresh the memory of the person who made the entries. *Burrough v. Martin*, 2 *Camp.* 112. An official letter written at the end of a voyage by the captain, and produced from the Admiralty, seems to have been held evidence of the facts stated in it, in a suit *inter alios*, in *Watson v. King*, 4 *Camp.* 275. Muster rolls of the King's ships, produced from the Admiralty, are evidence of the fact that persons therein named were then on board. *Semb. Barber v. Holmes*, 3 *Esp.* 190. A copy of the searcher's report at the Custom House is evidence of the cargo on board; being an official paper made under a statute. *Johnson v. Ward*, 6 *Esp.* 48. The bank-books are the best evidence to prove a transfer of stock; the testimony of the broker is not enough. *Breton v. Cope, Peake*, 30. So the book from the master's office in K. B. will prove a person an attorney of that court, without production of the roll. *R. v. Crossley*, 2 *Esp.* 526. The poll-books at an election are evidence. *Mead v. Robinson, Willes*, 424. So the polling papers, handed in at a municipal election and produced by the town clerk, are, it seems, evidence of the vote given; but the custody of them must be traced, so as to identify them as original papers; and the mere production of papers, purporting to be such, by a succeeding town clerk, is not enough. *R. v. Ledgard*, 8 *A. & E.* 535. So the books of the King's Bench and Fleet prisons are admissible to prove the dates of the commitment and discharge of prisoners; *R. v. Aickles, Leach, C. L.* 436.; but *quære*; for these books are not kept by any public authority; and they are at all events not evidence of the *cause* of commitment, of which the commitment itself is the best evidence. *Salts v. Thomas*, 3 *B. & P.* 188. The copy of an official paper containing the number of passengers on board a vessel, made by the captain in pursuance of an act of parliament and deposited at the India House, is admissible to show the number and description of the persons on board the vessel. *Richardson v. Mellish, R. & M.* 66. *S. C.* 2 *Bing.* 229. Excise books, transcribed from the malster's specimen paper, are evidence against him, without calling the officers who have transcribed them. *R. v. Grimwood*, 1 *Price*, 369. Shipping entries at the Custom House have been disallowed as evidence to fix a party with fraud, unless the original note, from which the entry was made, be produced, and it be traced to him or his agent. *Hughes v. Wilson*, 1 *Stark.* 179. So an entry of the sale of a ship in the register of the Custom House is not evidence of ownership without connecting the party with it, though made under an act of parliament. *Fraser v. Hopkins*, 2 *Taunt.* 5. The books of the clerk of the market, made up under 47 *G. 3. s. 2. c. 68.*, are not *per se* evidence of the contract of sale as between the buyer and seller of coals in London, though the Act makes such entries evidence "in all actions touching any thing done in pur-

suance of it." *Brown v. Capel*, *M. & M.* 374. Entries in the books of the clerk of the peace, of deputations many years since granted to gamekeepers by the owner of a manor, are evidence, without production of the deputations themselves, to show that the party therein mentioned exercised the right of appointing gamekeepers. *Hunt v. Andrews*, *3 B. & A.* 341.; and see *Rushworth v. Craven*, *1 M'Cl. & Y.* 417. A manuscript book of the date of Eliz., purporting to be written by an officer of the Duchy of Lancaster and describing the duties of the office, is not evidence in behalf of his successor claiming to exercise the same rights and duties under an appointment from the duchy, though the book has been always kept and referred to as authority in the duchy office. *Jewison v. Dyson*, *2 M. & Rob.* 377. Where the plaintiff, the surgeon of a workhouse, was desirous of disproving neglect of a pauper, he was not permitted to put in evidence a journal kept by him and stating his attendances, though it was kept by order of the Poor Law Commissioners under *4 & 5 W. 4. c. 76.* *Merrick v. Wakley*, *8 A. & E.* 170. Returns of sales of corn under *1 & 2 G. 4. c. 87.* are not conclusive evidence to show the parties to whom the corn was delivered; for it is no part of the duty of the corn factor to mention this in the return; and, *quære*, if they are evidence at all for this purpose? *Woodley v. Brown*, *2 Bing.* 527. An entry in a vestry book, stating that A. was duly elected treasurer of the parish at a vestry duly held in pursuance of notice, is evidence of such election, and of its regularity. *R. v. Martin*, *2 Camp.* 100. *Hartley v. Cook*, *5 C. & P.* 441. But it must appear by the entry, or *alunde*, that the meeting was duly convened after proper notice. *Heysham v. Forster*, *5 M. & R.* 277. So a wardmote-book proves the election of a constable in the city of London. *Underhill v. Wills*, *3 Esp.* 56. In an action for disturbing the plaintiff in the enjoyment of a pew claimed in right of his messuage, an old entry in the vestry-book, signed by the churchwardens, stating repairs of the pew by a former owner of the messuage (under whom the plaintiff claims), in consideration of his using it, is evidence to prove the plaintiff's title; for it is made by the churchwardens on a subject within the scope of their official authority. *Price v. Littlewood*, *3 Camp.* 288. But see *Cooke v. Banks*, *2 C. & P.* 478. The book kept by the Secretary of Bankrupts was held not even secondary evidence of a certificate. *Henry v. Leigh*, *3 Camp.* 498. The transfer-book of a railway company is not evidence of the title of the transferee, though an act of parliament makes the entry necessary to complete the title. *Hare v. Waring*, *3 M. & W.* 362. Nor is the memorial of a registered conveyance evidence of such conveyance. *Per Parke B.*, *ib.* 379. But the book of proceedings of railway directors, purporting to be signed by the chairman or deputy chairman, is usually made evidence of the facts stated in it by the act passed for establishing the company: and in such cases proof of the signature is unnecessary. *Sheffield and Manchester Railway v. Woodcock*, *7 M. & W.* 574.

Land-tax books.] Land-tax assessment books are evidence of the occupation of land by the parties named in them. *Doe v. Seaton*, *2 A. & E.* 171. But where it was proved to be usual to make no alteration in the name as long as the land was in the *same family*, they were rejected. *Doe v. Arkwright*, *ib.* 182.

Heralds' books.] The Heralds' visitation books, made under commissions regularly issued till the close of the seventeenth century (2 James 2.), are evidence of the facts therein recorded in matters of pedigree. *B. N. P.* 248. *Report on Public Records*, 1800, p. 82. And it is usual, and safer, to be prepared with evidence of the commissions; though, as they were general ones, and not merely issued *pro hac vice*, such evidence is, perhaps, not strictly necessary. See *antè*, *Proof of Inquisitions*, pp. 75, 76. But a pedigree, deduced from these books and drawn up by a herald, is not admissible. *King v. Foster, T. Jones*, 224. 2 *Rol. Ab.* 686. So a written pedigree, purporting to be made by one of the family and entered in the herald's books, is not evidence. *Per Fortescue J.*, 12 *Vin. Evid.* p. 119. An affidavit stating the members of deponent's family, found in the herald's office, may be good evidence as a declaration; and, where the original was lost, an entry of it in their books has been allowed as secondary evidence. *Per Littledale J.*, *Doe v. Gascoigne*, 2 *Stark. Ev. App.* 1087.

Bishop's registers.] The register book of the bishop, containing entries of the business transacted at visitations, has been admitted as evidence of the right of nomination to a curacy. *Arnold v. Bishop of Bath and Wells*, 5 *Bing.* 316. So episcopal books have been admitted as evidence of vicarial endowments. *Tucker v. Wilkins*, 4 *Sim.* 262. *Leonard v. Franklyn*, 1 *Daniel*, 34. An enrolment book of leases granted by the Bishop of Durham was allowed as secondary evidence of a lease, on behalf of one claiming under the bishop; being a public muniment; *Humble v. Hunt*, *Holt N. P. C.* 601.; and a similar register of Chapter leases, from the Chapter House of Salisbury, was admitted as evidence of reputation respecting the limits of a parish. *Per Tindal C. J.* in *Coombs v. Coether, M. & M.* 398. See *antè*, p. 74. 95. as to *Enrolments*.

Certificates.] Notarial and consular certificates are not evidence of the facts certified. *Ex parte Church*, 1 *D. & R.* 324. *Waldron v. Coombe*, 3 *Taunt.* 162., *antè*, p. 145, 146.; and a copy of a charter-party made by a foreign notary, and delivered to the parties, is not admissible proof of the contract, though such copies are received in the foreign courts. *Brown v. Thornton*, 6 *A. & E.* 185. A certificate of ordination under the seal of the bishop is evidence of holy orders. *R. v. Bathwick*, 2 *B. & Ad.* 639.

Post-mark.] The post-mark on a letter has been admitted as evidence of the date of its being sent; *Abbey v. Lill*, 5 *Bing.* 299.; *Plumer's case*, *R. & R. C. C.* 264.; and as proof of the receipt of its contents. *Arcangelo v. Thompson*, 2 *Camp.* 620. But a post-mark may be contradicted by parol evidence of the real date of posting. *Stocken v. Collin*, 7 *M. & W.* 515. *Vide antè*, p. 83.

Books of history.] A general history may be given in evidence to prove a matter relating to the kingdom in general. *B. N. P.* 248. *Vin. Ab. Ev.* (*A. b.* 40.). Thus chronicles have been admitted to prove that at a certain period Charles the Fifth of Spain had not surrendered the crown to Philip. *Neale v. Fry*, cited 1 *Salk.* 282. But historical evidence of this kind is only to be used in proof of a matter concerning the government, and was therefore rejected as proof that King Alfred

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was the founder of a college. *Cockman v. Mather*, 1 *Barnardist.* 14. See *Brounker v. Atkyns*, *Skin. Rep.* 15. Nor can it be admitted in proof of a local custom: thus, Camden's Britannia was held to be no evidence on an issue whether, by the custom of Droitwich, salt-pits could be sunk in any part of the town. *Stainer v. Burgesses of Droitwich*, 1 *Salk.* 281. Nor is it evidence of the creation of a peerage. *Vaux Peerage*, 5 *Cl. & F.* 526.

Effect of Corporation Books.

The public acts of a municipal corporation, registered in their books, may be proved by the books themselves, which are evidence of them even as between strangers. *Case of Thetford*, 12 *Vin. Ab.* 90., and cases cited *antè*, p. 84. Thus an entry of the disfranchisement of a corporator is evidence to restore his competency as a witness, and cannot be collaterally examined on the merits. *Brown v. London*, 11 *Mod.* 225. But the books of a corporation, whether public or private, are not admissible in their favour as to matters of a private nature; as, to establish a claim of toll; *Brett v. Beales*, *M. & M.* 419., cited *antè*, p. 33.; *S. C.* 5 *M. & R.* 435.; *Marriage v. Lawrence*, 3 *B. & A.* 142.; *London v. Lynn*, 1 *H. Bl.* 214. (n); or a right to appoint a curate, as against the vicar; *Att. Gen. v. Warwick*, 4 *Russ.* 222.; or an exclusive right of trading. *Davies v. Morgan*, 1 *C. & J.* 590-3. So where a water company was sued on a bond, their books were rejected as proof, for them, that the bond was executed at an irregular meeting, although the plaintiff was a proprietor, and the private act required such books to be kept, and to be open for inspection to proprietors. *Hill v. Manchester Water Works*, 5 *B. & Ad.* 866. Where plaintiff sued the corporation (of which he was an alderman) on a bond, and defendants pleaded, 1. Fraud, 2. That the bond was irregularly executed contrary to a bye-law, Parke B. admitted the books of the corporation to prove the bye-law, but rejected them as evidence for the defendants of a pecuniary transaction between the plaintiff and the corporation in proof of the fraud. *Holdsworth v. Mayor of Dartmouth, Exeter*, *S. A.* 1838, *MSS.*

Effect of Parish Registers, &c.

The registers of christenings, marriages, and burials, preserved in churches, are good evidence of the facts which it is the duty of the officiating minister to record in them. *B. N. P.* 247. *Doe v. Bray*, 8 *B. & C.* 816. Where it appeared that the practice was to make entries in the general parish register, once in three months, out of a day-book in which the entries were made immediately after the christening, or on the same morning; and in the day-book, after a particular entry, the letters B. B. (signifying base-born) were inserted which were omitted in the register, it was held that evidence of the day-book could not be received; for that there could not be two parish registers. *May v. May*, 2 *Stra.* 1073. The register is in itself no evidence of the identity of the parties. *Birt v. Barlow*, 1 *Doug.* 170.

The books of Fleet, King's Bench, and May Fair marriages are not evidence to prove a marriage; for they were not made by public authority. They are, in fact, only private memorandums kept by ministers who officiated at clandestine marriages contrary to the canons of the

church. See *Burn on Fleet Registers*, ch. 6. Such a register, however, may, if signed by a party, be equivalent to a declaration by such party; and, as such, admissible where hearsay is admissible. *Lloyd v. Passingham*, 16 Ves. 59. A register of a foreign chapel is not admissible in our courts to prove a marriage abroad; *Leader v. Barry*, 1 Esp. 353.; nor of a dissenting chapel; for it is not a public document. *Newham v. Raithby*, 1 Phill. Rep. 315. *Ex parte Taylor*, 1 J. & W. 483. So a copy of a register of baptism kept in the island of Guernsey is not admissible. *Huet v. Le Mesurier*, 1 Cox's Ca. 275. But the legislature has lately provided that certain non-parochial registers of births, baptisms, deaths, burials, and marriages shall be admissible evidence. See 3 & 4 Vict. c. 92., cited *antè*, p. 84.

An entry, in a parish register of baptism, of the time of a child's birth is not evidence of the age, the clergyman having no authority to make it. *Whien v. Law*, 3 Stark. 63. But it may, if it can be shown on whose information it was made, be admissible as a declaration; *S. C.*; and in the ecclesiastical courts it is "adminicular" evidence of minority. *Agg v. Davies*, 2 Phill. Rep. 345. Nor is the register of the christening of a child in a particular parish evidence, unaccompanied by other circumstances, that the child was born in that parish. *R. v. North Petherton*, 5 B. & C. 508. It seems, however, that, if the age of the party baptized can be shown to correspond with the date of the entry, so as to prove baptism immediately after birth, this is *some* evidence of birth in that parish. *R. v. St. Katharine*, 5 B. & Ad. 970.; and see *R. v. Lubbenham*, *ib.* 968. Where a register of baptism stated that the child was illegitimate, Alderson J. admitted it as proof of that fact, observing that similar evidence had been admitted in another case. *Cope v. Cope*, 1 M. & Rob. 269. But the evidence was allowed to be of little weight, and to amount to mere "reputation in the village." *Id.* 276. A register of marriage is evidence of the *time* of the marriage. *Doe v. Barnes*, 1 M. & Rob. 386. An entry by a minister of a baptism which took place before he became minister, and of which he received information from the parish clerk, is not admissible; nor is the private memorandum of the fact, made by the clerk who was present at the baptism. *Doe v. Bray*, 8 B. & C. 813.

As to the provisions of the late acts for registering births, deaths, and marriages, see *antè*, p. 84, 85. As those acts require a fuller statement to be entered in the registers than heretofore, a question may hereafter arise how far the register will be evidence of *all* the facts stated in it; as the time and place of birth, age, description, &c.

Effect of Ship's Register.

A ship's register, describing it to be British built, is no evidence of that fact as against third persons. *Reusse v. Meyers*, 3 Camp. 475. The register made under the Shipping Acts (*antè*, p. 85.) is not evidence of ownership, except as against the persons who made the affidavit or declaration. *Cooper v. South*, 4 Taunt. 802.

Effect of Awards.

An award, regularly made by an arbitrator to whom matters in difference are referred, is conclusive in an action at law between the parties to the reference upon all matters inquired into within the

submission. 1 *Phill. Ev.* 360. *Campbell v. Twemlow*, 1 *Price*, 81. Thus where a covenantor and covenantee submitted the amount of damages on a breach of covenant to arbitration, the award was held conclusive. *Whitehead v. Tattersall*, 1 *A. & E.* 491. So where in an action of ejectment it appeared that the lessor of the plaintiff and the defendant had before referred their right to the land to an arbitrator, who had awarded in favour of the lessor, it was held that the award precluded the defendant from disputing the lessor's title. *Doe v. Rosser*, 3 *East*, 15. But where, on a reference by landlord and tenant, the arbitrator awarded that a stack of hay, left upon the premises by the tenant, should be delivered up by him to the landlord upon the tenant being paid a certain sum, it was held that the property in the hay did not pass to the landlord on his tender of the money, by mere force of the award. *Hunter v. Rice*, 15 *East*, 100. Where the commissioners under an inclosure act were directed to make an award respecting the boundaries of a parish, and to advertise a description of the boundaries so fixed, and the boundaries so fixed were to be inserted in their award, and to be binding, final, and conclusive; but the boundaries mentioned in the award varied from those which had been advertised; it was held that, the commissioners not having pursued their authority, their award was not binding as to the boundaries. *R. v. Washbrook*, 4 *B. & C.* 732.

An award made on a reference of all matters in difference between the parties will not be a bar with regard to any demand which was not in difference between them at the time of the submission, nor referred by them to the arbitrators. *Ravee v. Farmer*, 4 *T. R.* 146. *Smith v. Johnson*, 15 *East*, 213. And awards under inclosure acts are on the same footing as private submissions; therefore if such an award goes beyond the powers of the commissioners, it is void *pro tanto*; and if it omit to decide on anything within the scope of the submission, the interest of parties remains in *stato quo*. *Per Best C. J. Thorpe v. Cooper*, 5 *Bing.* 129. But where an action by a person for salary, and also for damages for dismissal from service, was referred, and the plaintiff gave evidence of dismissal, but claimed no damages for it before the arbitrator, who only awarded the amount of salary; held that the award was nevertheless a bar to a second action for damages for the dismissal. *Dunn v. Murray*, 9 *B. & C.* 780. See *Hadley v. Green*, 2 *C. & J.* 374.

The judgment of an usurped jurisdiction between parties is not admissible as an award without proof of mutual submission. *Rogers v. Wood*, 2 *B. & Ad.* 245.

An award made on ejectment brought by A. against a mortgagor, after mortgage, is not evidence for A. on an ejectment brought by the mortgagee against him. *Doe v. Webber*, 1 *A. & E.* 119. But where the right to a watercourse and a question of boundary were referred by a submission between A. and his tenant B. on the one side, and C., a neighbouring landowner, on the other, the award was held admissible evidence for C. on both points in a subsequent action by him against B.; although B. had, in the mean time, become tenant of the same land to another landlord under whom he now justified, and who was not shown to be in privity with A. *Breton v. Knight*, *Winton Sum. A.* 1837, *per Tindal C. J.*, confirmed in *Scacc.* on motion for new trial, *MSS.* On an issue between plaintiff and an execution creditor of B., whether

growing crops belonged to B., an award made between plaintiff and B., touching the crops, just before the execution, was held admissible as against the defendant. *Thorpe v. Eyre*, 1 A. & E. 926.

An award of money is evidence under an account stated. *Keen v. Batshore*, 1 Esp. 194. And in assumpsit on a policy, Lord Kenyon admitted evidence that the defendant had agreed to be bound by an award to which other persons were parties, and that the award was in favour of the plaintiff. *Kingston v. Phelps, Peake*, 228.

That an award is not evidence, as between strangers, even in a matter in which hearsay is admissible, see *Evans v. Rees*, 10 A. & E. 151., cited *antè*, p. 29.

Of the effect of awards under enclosure acts, see further *antè*, p. 100.

STAMPS.

The subject of stamps, though important and useful at *Nisi Prius*, is one that cannot be treated of at length in a work of this kind. The following summary only professes to contain the leading principles and a selection of some of the most important decisions upon this head.

Effect of want of stamp.] The several statutes for the imposition of stamp duties (of which 5 W. & M. c. 21. is one of the earliest) provide that no instrument, requiring a stamp, shall be *pleaded* or *given in evidence* in any court; or admitted in any court, to be *good, useful, or available* in law or equity; until as well the duty, as the penalty (if incurred), shall be paid, a receipt under the hand of the proper officer produced, and the instrument marked or stamped with the lawful stamp.

An instrument, therefore, requiring a stamp, cannot be produced in evidence without being stamped; and if parties agree by parol or by implication to be bound by the same terms as those contained in another written instrument, the latter cannot be given in evidence unless properly stamped. *Turner v. Power*, 7 B. & C. 625. *Walliss v. Broadbent*, 4 A. & E. 877. *Drant v. Brown*, 3 B. & C. 665. When an unstamped instrument in writing has been lost, *R. v. Castle Morton*, 3 B. & A. 588., or destroyed even by the party who objects to the want of the stamp, *Rippiner v. Wright*, 2 B. & A. 478., parol evidence of the contents is inadmissible. But in some cases in which an instrument has been lost, which is not proved to have been properly stamped, that fact may be presumed; as where an indenture of apprenticeship, executed thirty years before, was lost, it was presumed to have been properly stamped, though an officer from the stamp-office proved that it did not appear that any such indenture had been stamped. *R. v. Long Buckby*, 7 East, 45. So an order of payment given by the defendant to the plaintiff, and lost by the latter, will be presumed, as against defendant, to have been duly stamped. *Pooley v. Goodwin*, 4 A. & E. 94. And where a party refuses to produce an agreement after notice, it will be presumed, as against him, to be properly stamped. *Crisp v. Anderson*, 1 Stark. 35.

Where the transaction is capable of being legally proved by other evidence than that of the instrument which ought to bear a stamp, such

evidence may be resorted to : thus, where a promissory note appears to be improperly stamped, the plaintiff may resort to the original consideration. *Farr v. Price*, 1 *East*, 58. *Tyte v. Jones*, *id.* (n). And a verbal admission of a debt, and promise to pay it, may be proved, though the party at the same time gave an unstamped admission and promise to pay. *Singleton v. Barrett*, 2 *C. & J.* 368. So, though an unstamped receipt is no evidence of payment, the fact of payment may be proved by a witness who was present. *Rambert v. Cohen*, 4 *Exp.* 213. Where an action is brought upon an instrument which ought to be stamped, and the form of the pleading is such that at the trial it is not necessary to produce it, a court of law will not examine whether it is legally available with reference to the stamp laws. *Per* Lord Eldon C., *Huddleston v. Briscoe*, 11 *Ves.* 596. *Thynne v. Protheroe*, 2 *M. & S.* 553. When a bill of exchange on a wrong stamp has been given for goods sold, the vendor, in suing for the price, need not prove notice of dishonour. *Cundy v. Marriott*, 1 *B. & Ad.* 696.

If a plaintiff succeeds in making out a case of implied or oral contract, and it does not appear on the cross-examination of his witnesses that there was any contract in writing, the defendant will not be allowed to give an unstamped written contract in evidence for the purpose of nonsuited the plaintiff. *Fielder v. Ray*, 6 *Bing.* 332. *R. v. Padstow*, 4 *B. & Ad.* 208. *Magnay v. Knight*, 1 *M. & G.* 944. A party who executes the counterpart of a deed, properly stamped, cannot object to its admissibility in evidence, on the ground that the original is not properly stamped. *Paul v. Meek*, 2 *Y. & J.* 116.

Unstamped instrument, when evidence for collateral purposes.] In many cases an instrument, not legally stamped, is admissible to prove a collateral fact. Thus in an action of debt for bribery at an election, an unstamped promissory note payable to the defendant, which the witness said he had given for the repayment of money received by him, as a voter, from the defendant, is evidence to corroborate the testimony of the witness. *Dover v. Maestaer*, 5 *Exp.* 92. So an unstamped agreement has been admitted between the parties to prove usury. *Nash v. Duncomb*, 1 *M. & Rob.* 104. Or to show the illegal consideration of the plaintiff's debt. *Coppock v. Bower*, 4 *M. & W.* 361. Or to refresh a witness's memory; *anté*, p. 131. An unstamped promissory note may be given in evidence to establish fraud by showing that it was written by the maker in a state of intoxication. *Gregory v. Fraser*, 3 *Camp.* 454. *Keable v. Payne*, 8 *A. & E.* 555. And an allegation that plaintiff delivered up a guarantee may be proved by delivery of an unstamped guarantee. *Haigh v. Brooks*, 10 *A. & E.* 309. The court may inspect an unstamped writing for the purpose of ascertaining whether its contents preclude the admission of parol evidence. *R. v. Pendleton*, 15 *East*, 449. But such an instrument cannot be read to the jury as evidence of the contract, or any part of it, in respect of which the plaintiff sues. *Jardine v. Payne*, 1 *B. & Ad.* 670. Where a party declared upon two written agreements, by the second of which variations were made in the first, and there were counts upon each separately, and it appeared, when the instruments were produced in evidence by the plaintiff, that the first only was stamped, it was held that the second could not be read in evidence to support the plaintiff's case, but might be looked at by the court in order to ascertain whether the

first was altered by it ; and that, if it was, the plaintiff could not exclude the second agreement, and proceed upon the first only. *Reed v. Deere*, 7 B. & C. 261. Where, in an action against an acceptor, it appeared that on the bill becoming due his name had been erased and another bill (unstamped) drawn on the back of the first, it was held that the unstamped bill could not be submitted to the jury for the purpose of drawing the conclusion that the first bill had been cancelled. *Sweeting v. Halse*, 9 B. & C. 365. But where the plaintiff proved a deposit of money on certain terms contained in a promissory note duly stamped, and the note was afterwards altered by consent so as to become invalid for want of a fresh stamp, it was held to be still admissible evidence of the terms of the deposit. *Sutton v. Toomer*, 7 B. & C. 416.

Several stamps ; several contracts with one stamp ; and number of words.] Where the subject matter of the instrument is joint, though several persons are interested in it, only one stamp is requisite. Thus, an assignment of the prize money of several seamen on board a privateer, payable out of one fund, requires only one stamp. *Baker v. Jardine*, 13 East, 235. (n) So an agreement by several for a subscription for one common fund. *Davis v. Williams*, 13 East, 232. So an agreement of reference by all the underwriters on one policy. *Goodson v. Forbes*, 6 Taunt. 171. So a bond by several obligors, in a penalty conditioned for the performance of certain acts by each and every of them. *Bowen v. Ashley*, 1 N. R. 274. ; 6 Taunt. 175. ; and see *Stead v. Liddard*, 1 Bing. 196. So an agreement by three persons, in consideration that A. would pay a certain debt and costs, to indemnify A. to the extent of 50*l.*, to be paid separately by each, and one fourth of the costs, requires only one stamp. *Ramsbottom v. Davis*, 4 M. & W. 584. A release by several commoners of their respective rights makes them all competent witnesses, though there be only one stamp. *Carpenter v. Buller*, 2 M. & Rob. 298. See also *Thomas v. Bird*, 9 M. & W. 68. And where the members of a mutual insurance club all executed the same power of attorney, severally authorising the persons therein named to sign the club policies for them, it was held to require only one stamp. *Allen v. Morrison*, 8 B. & C. 565. Whether a release to two witnesses with one stamp is good, appears to be doubtful. *Spicer v. Burgess*, 1 C. M. & R. 129.

When an agreement refers to another document, and the two papers form, in fact, but one agreement, it is sufficient if one of them only bear a stamp. *Peate v. Dicken*, 1 C. M. & R. 422. But where a paper contains several contracts, and consequently requires several stamps, and only one is impressed upon it, that stamp applies to the contract only on which the stamp is impressed. *Powell v. Edmunds*, 12 East, 6. And if it is uncertain to which the stamp applies, the paper is inadmissible. *Per Cur. Shipton v. Thornton*, 9 A. & E. 331. To a stamped agreement to refer to A., the parties some days afterwards added a memorandum appointing B. instead of A. : held that one stamp was sufficient. *Taylor v. Parry*, 1 M. & G. 604. Where the defendant made in his own name a single agreement as to goods of his own, and also goods of himself and partners, and signed it in the name of the firm ; held, in an action on it against him alone, that only one stamp was necessary. *Shipton v. Thornton*, 9 A. & E. 314. Where an instrument contains a contract of demise, general in its terms, but

several in its operation with respect to the different tenants who sign, it is matter of evidence to which contract the stamp applies, and the juxtaposition of the stamp is to be regarded. *Doe v. Day*, 13 East, 241. Where the several admissions of five corporators, as freemen, were written on the same paper with only one stamp, such stamp was held to apply to the first admission only, and the others could not be read. *R. v. Reeks*, 2 Ld. Raym. 1445. ; and see *Perry v. Bouchier*, 4 Camp. 80. ; *Waddington v. Francis*, 5 Esp. 182.

The defendant executed a release to one of his witnesses in the usual manner, and gave it to his attorney : at the trial, it appeared that another witness would require to be released : his name was accordingly inserted in the release, and the defendant re-executed it before it had been delivered to either witness ; it was held, that this re-execution did not make a fresh stamp necessary. *Spicer v. Burgess*, 1 C. M. & R. 129.

The stamp on an agreement, which incorporates by reference a clause in a former one, is properly regulated by the quantity of words in the second agreement not including the clause referred to ; *Attwood v. Small*, 7 B. & C. 390. ; for the stamp is regulated by the words in the instrument itself, or in something "indorsed thereon, or annexed thereto." *Sneezum v. Marshall*, 7 M. & W. 417. Where an agreement and a writing, described therein as annexed to it, contain together more than 1080 words, a 35s. stamp is required, although in fact the writing was annexed to the agreement after it was executed. *Veal v. Nicholls*, 1 M. & Rob. 248. Signatures must be counted ; and where there is a joint agreement to be responsible, rateably, according to the sum against each name, all the names and sums must be counted. *Linley v. Clarkson*, 1 C. & M. 437.

Proper denomination.] By the statute 43 G. 3. c. 127. s. 6. if the stamp is of a proper denomination it shall not be ineffectual from its being of a greater value than the Stamp Acts require ; and by statute 55 G. 3. c. 184. s. 10. all instruments for or upon which any stamp or stamps shall have been used, of an improper denomination, or rate of duty, but of equal or greater value in the whole with or than the stamp or stamps which ought regularly to have been used thereon, shall be deemed valid and effectual in law, except in cases where the stamp or stamps used in such instrument shall have been specifically appropriated to any other instrument by having its name on the face thereof.

Time of stamping.] If an instrument bears a proper stamp when produced at the trial, it is sufficient, though it was not stamped when it was executed, provided the commissioners of stamps are not expressly prohibited from subsequently affixing a stamp. *R. v. Bp. of Chester*, 1 Stra. 624. ; and see *Rogers v. James*, 7 Taunt. 147. The court will not inquire whether the penalty has been paid, or whether the stamp has been affixed in proper time, but will receive the instrument in evidence, though with regard to its effect they will inquire into the time when a period is limited by statute. *R. v. Preston*, 5 B. & Ad. 1028. *R. v. Tomblinson*, 3 Dowl. P. C. 49. And with regard to an instrument to which a stamp cannot be subsequently affixed, an inquiry as to the time of affixing is admissible. *Green v. Davies*, 4 B. & C. 235. ; but see *Wright v. Riley, Peake*, 173., *contra*.

The power of stamping on payment of a penalty does not extend to bills, notes, or drafts. 37 G. 3. c. 136. s. 2.

Time and mode of objecting to the stamp.] The objection must be made before the paper is read in evidence. *Foss v. Wagner*, 7 A. & E. 116. But where the objection does not appear except on extrinsic evidence, as where a check is post dated, the objection may be made after it has been read. *Field v. Woods*, *Id.* 114. The party who objects must point out to the court the precise objection; and, where it is founded on the number of words, must produce a witness who has counted them.

Agreements.

By 55 G. 3. c. 184. sched. part 1. an agreement, or any minute, or memorandum of an agreement, made in England, under hand only, or made in Scotland, without any clause of registration (and not otherwise charged in the schedule to that act, nor expressly exempted from all stamp duty), where the matter thereof shall be of the value of 20*l.* or upwards, *whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument, together with every schedule, receipt, or other matter put or indorsed thereon, or annexed thereto*, shall bear a 1*l.* stamp, if not containing more than 1080 words; if more, then a 35*s.* stamp; and for every quantity of 1080 words over and above the first 1080, there shall be a further progressive duty of 25*s.* Provided that where divers letters are offered in evidence to prove an agreement between the writers, it shall be sufficient if any one bear a 35*s.* stamp, although the same shall contain twice 1080 words, and upwards.

See similar provisions in 44 G. 3. c. 98., and 48 G. 3. c. 149., upon which many of the cases cited below arose.

The following are the exemptions in the schedule (besides the general exemptions specified at the end of sched. part. 1.):—

First exemption.] Label, slip, or memorandum, containing the heads of insurances to be made by the corporations of the Royal Exchange Assurance, or London Assurance, or by the corporations of the Royal Exchange Assurance of houses and goods from fire, and London Assurance of houses and goods from fire.

Second exemption.] Memorandum or agreement for granting a lease or tack, at rack rent, of any messuage, land, or tenement, under the yearly rent of 5*l.* An agreement for a building lease, though under 5*l.* per annum, has been held not within this exemption, the interest being a beneficial one. *Doe v. Boulcot*, 2 Esp. 595.

Third exemption.] Memorandum or agreement for the hire of any labourer, artificer, manufacturer, or menial servant. An assignment of an apprentice is not within this exemption. *R. v. St. Paul's, Bedford*, 6 T. R. 452.

Fourth exemption.] Memorandum, letter, or agreement made for or relating to the sale of any goods, wares, or merchandises.

Cases within the fourth exemption.] An undertaking to guarantee the payment of goods to be furnished to third persons. *Warrington*

v. Furber, 8 *East*, 242. An agreement by A. to take half of certain goods bought by B. on their joint account, and to furnish B. with half the amount in time for payment. *Venning v. Leckie*, 13 *East*, 7. An agreement to cancel a former agreement relative to the sale of goods, and for the future sale of goods upon different terms. *Whitworth v. Crockett*, 2 *Stark*, 431. An agreement for the sale of rape oil, not yet expressed from the seed. *Wilks v. Atkinson*, 6 *Taunt.* 11. An agreement to make a chattel and deliver it within a certain time; *Pinner v. Arnold*, 2 *C. M. & R.* 613.; though it was formerly held that a contract to make goods for sale was not within the exemption. *Burton v. Bedall*, 3 *East*, 303. An agreement for the sale of chimney-pieces, the vendor "to finish them in a tradesman-like manner." *Hughes v. Breeds*, 2 *C. & P.* 159. A receipt for the price of a horse containing a warranty of soundness. *Skrine v. Elmore*, 2 *Camp.* 407. An agreement for a crop growing in a close, and conferring no interest in the land. *Parker v. Staniland*, 11 *East*, 362. *Warwick v. Bruce*, 2 *M. & S.* 205. *Evans v. Roberts*, 5 *B. & C.* 829. *Watts v. Friend*, 10 *B. & C.* 446. *Jones v. Flint*, 10 *A. & E.* 753. An agreement for the purchase of timber, though the trees are growing. *Smith v. Surman*, 9 *B. & C.* 561. An agreement to supply a house with water. *West Middlesex Water Works v. Suwerkropp*, *M. & M.* 408. Some of the above cases were decided on the fourth section of the Statute of Frauds; but they are authorities on the Stamp Act also.

Cases not within the fourth exemption.] An agreement for the sale of goods and goodwill. *South v. Finch*, 3 *New Ca.* 506. A contract for the erection of fixtures. *Semb. per Parke B., Pinner v. Arnold*, 2 *C. M. & R.* 613. An agreement by a principal to provide for certain bills drawn upon his factor, if certain goods, then either in the factor's possession or about to be placed there, should remain unsold at the time of the bills falling due: for the exemption is confined to instruments whereof the sale of goods is the primary object. *Smith v. Cator*, 2 *B. & A.* 778. An agreement for the sale of growing crops, conferring an interest in the land. *Crosby v. Wadsworth*, 6 *East*, 602. *Waddington v. Bristow*, 2 *B. & P.* 453. *Emmerson v. Heelis*, 2 *Taunt.* 38. (cases on the fourth section of the Statute of Frauds). So a sale of growing underwood, to be cut by the purchaser, has been held to confer an interest in land under the fourth section of the Statute of Frauds. *Scorell v. Borall*, 1 *Y. & J.* 396. A contract, under seal, for the sale of goods. *Per Bayley J., Clayton v. Burtenshaw*, 5 *B. & C.* 45.

Fifth exemption.] Memorandum or agreement, made between the master and mariners of any ship or vessel, for wages on any voyage coastwise from port to port in Great Britain.

Sixth exemption.] Letters containing any agreement (not before exempted) in respect of any merchandise, or evidence of such an agreement, which shall pass by the post between merchants and other persons carrying on trade or commerce in Great Britain, and residing, or actually being at the time of sending such letters, at the distance of fifty miles from each other.

A letter by a son, who managed his mother's business, to a creditor of his mother residing above fifty miles from him, containing a promise

to pay the debt of the mother, is within this exemption. *Mackenzie v. Banks*, 5 T. R. 176.

By the 5 & 6 W. 4. c. 19. s. 35. all agreements with the crew of a ship made in pursuance of, and in conformity with that act, and all indentures of parish and voluntary apprentices to the sea service, and all counterparts and assignments of such indentures, executed after the passing of the act, are exempted from stamp duty.

The 9 G. 4. c. 14. s. 8. exempts from stamp duty any agreement made necessary by that act to avoid the Statute of Limitations; thus a qualified promise to pay, put in evidence not to prove the debt but to rebut the statute, is exempt. *Morris v. Dixon*, 4 A. & E. 845.

Agreements within the Stamp Act.] The statute only requires an agreement to be stamped when the matter thereof shall be of the value of 20*l.* or upwards. It therefore only applies when the value of the contract is measurable; thus a contract of marriage may be proved by unstamped letters. *Orford v. Cole*, 2 Stark. 351. The general regulations of a free-school under which the master is appointed, signed by him and the trustees, may be proved against him, though unstamped. *Browne v. Dawson*, 12 A. & E. 624. A memorandum by a wharfinger of the receipt of goods, to be shipped in a particular manner, may be given in evidence to show the terms upon which they were received, without a stamp, the value of the goods being above 20*l.*, but the wharfage being of less amount. *Chadwick v. Sills*, R. & M. 15. But an agreement to indemnify A. from all costs, charges, damages, or other expenses, which he may incur as bail for B., requires an agreement stamp, the arrest of B. being for more than 20*l.*, though the costs, &c. incurred do not amount to that sum. *Williams v. Jarrett*, 5 B. & Ad. 32. And it seems that an agreement to enlarge the time for performing another agreement requires a new stamp, where the former one required to be stamped. *Bacon v. Simpson*, 3 M. & W. 78. A written paper delivered by the auctioneer to the bidder to whom lands were let by auction, containing the description of the lands, the terms for which they were let to the bidder, and the rent payable, but not signed by the auctioneer, or any of the parties, was held not to require a stamp, nor to exclude parol evidence; since it was collateral to the taking, and was no more than if the auctioneer had told the defendant on what terms he was to hold. *Ramsbottom v. Tunbridge*, 2 M. & S. 434. But where signed, it must be stamped; *Ramsbottom v. Mortley*, 2 M. & S. 445.; though signed only by the party against whom it is offered in evidence. *Hughes v. Budd*, 8 Dowl. P. C. 478. A proposal from A. to B. to let to B. a piece of land, on the terms contained in a written agreement between B. and C., A. afterwards agreeing that B. should have the land on the terms proposed, does not require a stamp. *Drant v. Brown*, 3 B. & C. 665. *Hawkins v. Warre*, 3 B. & C. 690. So an unstamped written agreement to indemnify, not signed, may be given in evidence to confirm a parol agreement; being only a *proposal*, and not binding. *Shackell v. Rosier*, 2 New Ca. 640. And, generally, an agreement is said to require to be stamped only where it is binding, *per se*, as such. *Per Patteson J.*, *R. v. St. Martins*, 2 A. & E. 210. An order for goods does not require a stamp; *Ingram v. Lea*, 2 Camp. 521.; nor a mere authority to pay money. *Parker v. Dubois*, 1 M. & W. 30. A written resolution of a company to employ A. on certain

terms, though unstamped, may be given in evidence against them by A. in an action for work and labour. *Vaughton v. Brine*, 1 M. & G. 359. And Tindal C. J. there said that the document requiring a stamp must be itself a memorandum of an agreement; Erskine J. thought it should be such a memorandum as would be evidence against both parties to it; and Maule J. was of opinion that the words in this part of the act [*ante*, p. 157.] were "used to exclude the excuse that the agreement, of which some memorandum is given in evidence, need not have been in writing." If the resolution had *purported* to be an agreement, and been assented to by A. as such, it would have required a stamp; *semb. per Rolfe B.*, in *Lucas v. Beach*, 1 M. & G. 417. The opinions expressed by the judges in *Vaughton v. Brine* were assented to by the Court of Exchequer in *Beeching v. Westbrook*, 8 M. & W. 411.

An instrument, operating as an attornment only, requires no stamp. *Doe v. Edward*, 5 A. & E. 95. *Doe v. Smith*, 8 A. & E. 255. In an action against an attorney, the plaintiff gave in evidence the following unstamped letter:—"I have this day received a bill of exchange for 50*l.*" (describing it), "which I hold as your attorney, to recover the value on from the respective parties, or to make such other arrangement for your benefit as may appear to me in my professional capacity reasonable and proper." Held that this letter was a mere acknowledgment of the duty which the party took upon himself to perform, and that it therefore required no stamp. *Langdon v. Wilson*, 7 B. & C. 640. (n) *Mullett v. Huchison*, 7 B. & C. 639. So an acknowledgment by the defendant of the deposit of goods with him requires no stamp, though given in evidence in an action against him for not redelivering them. *Blackwell v. M^cNaughtan*, 1 A. & E. N. S. 127. But an acknowledgment signed by the defendant, that he holds the land as tenant to the plaintiff on certain terms, cannot be put in evidence by the defendant to show that a notice to quit was irregular, unless it be stamped as an agreement, or evidence of one. *Doe v. Frankis*, 11 A. & E. 792. A broker's note of a purchase of shares, sent to his principal, requires no stamp. *Tomkins v. Savory*, 9 B. & C. 704.

Appraisement.

By 55 G. 3. c. 184., schedule, part 1., appraisement or valuation of any estate or effects, real or personal, heritable or movable, or of any interest therein, or of the annual value thereof, or of any dilapidations, or of any repairs wanted, or of the materials or labour used, or to be used, in any buildings, or of any artificer's work whatsoever, must be stamped, where the amount of appraisement does not exceed 50*l.*, 2*s.* 6*d.*; where it exceeds 50*l.* and does not exceed 100*l.*, 5*s.*; 100*l.* and not 200*l.*, 10*s.*; 200*l.* and not 500*l.*, 15*s.*; above 500*l.*, 1*l.*

Where nothing is referred but the mere value of goods, and the repairs of a farm, an appraisement stamp is proper, and not an award stamp. *Leeds v. Burrows*, 12 East, 1. It seems that the word "appraisement or valuation" do not extend to such as are made merely for the private information of parties, but to such only as are intended to be binding between them. *Atkinson v. Fell*, 5 M. & S. 243. *Jackson v. Shepherd*, 2 C. & M. 361.

Awards.

By 55 G. 3. c. 184., schedule, part 1., an award must be stamped with a 1*l.* 15*s.* stamp, and there is a further duty if it contains 2160

words. The appointment of an umpire, made in writing by two arbitrators, requires no stamp. *Routledge v. Thornton*, 4 *Taunt.* 704. An agreement stamp is not necessary to an arbitration bond which, besides the usual covenants, contains an agreement as to the payment of costs. *Re Wansborough*, 2 *Chitty's Rep.* 40. A paper drawn up by a person appointed by two parties to ascertain the amount of an account requires an award stamp. *Jebb v. M'Kiernan*, *M. & M.* 340. The opinion of counsel, by which parties agree to abide, does not require an award stamp. *Semb. Boyd v. Emerson*, 2 *A. & E.* 184. An award of land by commissioners of inclosure only requires an award stamp, and not an *ad valorem* stamp, as on a sale. *Doe v. Preston*, 7 *B. & C.* 392.

Bankers' Drafts.

By 55 G. 3. c. 184., schedule, part 1., all drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers, or any person or persons acting as a banker, who shall reside or transact the business of a banker, within ten miles of the place where such drafts or orders shall be issued, provided such place shall be specified in such drafts or orders, and provided the same shall bear date on or before the day on which the same shall be issued, and provided the same do not direct the payment to be made by bills or promissory notes, are exempt from stamp duty.

A draft drawn upon "A. B., bricklayer," is not within the exemption. *Castleman v. Ray*, 2 *B. & P.* 383. A post-dated draft, though not intended to be used till the day, must be stamped. *Allen v. Keesee*, 1 *East*, 435. And the objection is available under a denial of the making. *Field v. Woods*, 7 *A. & E.* 114.

Bills of Exchange.

By 55 G. 3. c. 184., the following stamps are imposed on bills of exchange:—

INLAND BILL of Exchange, Draft, or Order, to the Bearer, or to Order, either on Demand or otherwise, of any Sum of Money.

				Not exceeding 2 months after date, or 60 days after sight.		If exceeding two months after date, or 60 days after sight.	
£	s.	£	s.	£	s. d.	£	s. d.
Amounting to 2	0	and not exceeding 5	5	0	1 0	0	1 6
Exceeding....	5	5.....	20	0	1 6	0	2 0
	20	0.....	30	0	2 0	0	2 6
	30	0.....	50	0	2 6	0	3 6
	50	0.....	100	0	3 6	0	4 6
	100	0.....	200	0	4 6	0	5 0
	200	0.....	300	0	5 0	0	6 0
	300	0.....	500	0	6 0	0	8 6
	500	0.....	1000	0	8 6	0	12 6
	1000	0.....	2000	0	12 6	0	15 0
	2000	0.....	3000	0	15 0	1	5 0
	3000	0.....		1	5 0	1	10 0

Inland bills, drafts, or orders for the payment of any sum of money, though not made payable to the bearer or to order, if the same shall

be delivered to the payee, or some person on his behalf, have the same duty as on a bill of exchange for the like sum payable to bearer or order.

Inland bills, drafts, or orders for the payment of any sum of money weekly, monthly, or at any other stated periods, if made payable to the bearer or to order, or if delivered to the payee or some person on his behalf, where the total amount of the money thereby made payable shall be specified therein, or can be ascertained therefrom, bear the same duty as on a bill payable to bearer or order, on demand, for a sum equal to such total amount. And where the total amount of the money thereby made payable shall be indefinite, the same duty as on a bill, on demand, for the sum therein expressed only.

And the following instruments shall be deemed and taken to be inland bills, drafts, or orders, for the payment of money within the intent and meaning of this schedule; viz.

All drafts or orders for the payment of any sum of money by a bill or promissory note, or for the delivery of any such bill or note in payment or satisfaction of any sum of money, where such drafts or orders shall require a payment or delivery to be made to the bearer, or to order, or shall be delivered to the payee, or some person on his or her behalf.

All receipts given by any banker or bankers, or other person or persons, for money received, which shall entitle the person or persons paying the money, or the bearer of such receipts, to receive the like sum from any third person or persons.

And all bills, drafts, or orders for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer or to order, or if the same shall be delivered to the payee, or some person on his or her behalf.

What are bills, &c., within the schedule.] It was the object of the legislature, in framing this last provision, to treat as promissory notes and bills of exchange, and to subject to stamp duty, such instruments as, being payable on a contingency or out of a particular fund, could not, in strictness, fall under that denomination. *Per* Lord Ellenborough C. J., *Firbank v. Bell*, 1 B. & A. 36.; and see *Jones v. Simpson*, 2 B. & C. 321. In order to prove the payment of money pursuant to order, the following letter was given in evidence:—"Messrs. B. and H. When the mahogany, *per* Regent, is sold, you will please pay over to Messrs. P. 1500*l.*, in such bills as you receive from the said sale. S. Mann." Messrs. P. inclosed this letter in another, addressed by them to B. and H.; and B. and H., in reply, wrote, promising to pay over the money. The letter from Messrs. P. was stamped with an agreement stamp. It was objected that the letter from Mann was an order for payment of money out of a fund which might or might not be available, and that it ought to have been stamped accordingly, and of this opinion was the court. *Firbank v. Bell*, 1 B. & A. 36. F. and Co. wrote to S. and Co. the following letter:—"We request you will pay to Messrs. H. and Son, or their order, out of the first proceeds that become due of our stock of gunpowder now in your charge, 600*l.*, and charge the same to our account."

S. and Co., in answer, stated that they had no objection to pay as directed, provided they were in funds for that purpose, and subject to the payment of their advances; and other letters passed on the subject. The two first letters were stamped with an agreement stamp. Held that this case fell within the authority of *Firbank v. Bell*; and that the first letter was not admissible, not having been stamped as a bill. *Butts v. Swann*, 2 B. & B. 78. But in order to come within this clause, the instrument should be for the payment of a specified sum; and therefore, where A., having consigned goods to B., sent him the following order,—"Pay to A. B. the proceeds of a shipment of twelve bales of goods, value about 2000*l.*, consigned by me to you;" and B., by writing, consented to pay over the full amount of the net proceeds of the goods, it was held that neither of these instruments came within the above clause. *Jones v. Simpson*, 2 B. & C. 318.; and see *Rosc. Dig. Bills of Exchange*, p. 31. Where the order was to pay half the net proceeds to R. and Co., "provided the same shall not exceed 5000*l.*," the stamp duty was considered to attach. *Hutchinson v. Heyworth*, 9 A. & E. 375. 400. Where the order for payment (not being to bearer or order) is not to be delivered over to the payee or to any third person on his behalf, but is to be kept by the person to whom it is addressed, for his own security, it is not a bill within the act; though the party who receives the order may have afterwards given an undertaking to the payee to pay him the money. *S. C. ibid.* Where the creditor sends an account to his debtor, requesting him, at the foot of it, to pay the amount to A. B., and hands the account to A. B. to collect it on his (the creditor's) behalf, this is not a bill of exchange within the act. *Norris v. Solomon*, 2 M. & Rob. 266.

The word *date* in the schedule of the act means the actual date on the face of the bill; and a bill payable at two months' date, and properly stamped as such, is good, though post-dated and issued before the date; the party being liable to a penalty only. *Williams v. Jarrett*, 5 B. & Ad. 32.

Foreign bills.] A FOREIGN BILL of exchange (or bill of exchange drawn in, but payable out of, Great Britain), if drawn singly, and not in a set, bears the same duty as an inland bill of the same amount and tenour.

Foreign Bills of Exchange, drawn in Sets according to the custom of merchants, for every Bill of each Set,

	£	£	s.	d.
Where the sum made payable } thereby shall not exceed	100.....		1	6
And where it shall exceed	100 and not exceed 200		3	0
	200	500	4	0
	500	1000	5	0
	1000	2000	7	6
	2000	3000	10	0
And where it shall exceed	3000		15	0

A bill drawn in Ireland with blanks for the sum, the date, and the drawee's name, and transmitted to England in order to have the blanks

filled up, does not require an English stamp. *Snaitb v. Mingay*, 1 M. & S. 87. *Crutchly v. Mann*, 5 Taunt. 529. So a bill sketched out and accepted here, and transmitted to a person abroad for his signature as drawer is a foreign bill, and does not require an English stamp. *Boehm v. Campbell, Gow*, 56. A bill drawn in England on a person abroad, and accepted by him payable in England, is an inland bill, and must be stamped as such. *Amner v. Clark*, 2 C. M. & R. 468.

Stamp on re-issued bill.] A bill payable to the drawer's order, and taken up by him, may be re-issued without a fresh stamp. *Callow v. Lawrence*, 3 M. & S. 97.; *Hubbard v. Jackson*, 4 Bing. 390. But a bill payable to the order of a third person, and paid by the drawer, cannot be re-issued by him; for it would wrongfully charge the payee. *Beck v. Robley*, 1 H. Bl. 89. (n)

What alteration of a bill requires a new stamp.] If a bill or note is altered in a material part, though by the consent of all parties, and though the alteration be made by a stranger (*Master v. Miller*, 2 H. Bl. 141), after it has been once issued, it requires a new stamp; *Bayl. on Bills*, 89, 4th ed.; and such alteration not only makes a new stamp necessary, but vacates the bill (independently of the stamp laws), except as between the parties consenting to such alteration. *Ibid*; see *Downes v. Richardson*, 5 B. & A. 680. But the alteration of a bill by the drawer, though it prevents him from suing on the bill, will not prevent him from suing the acceptor upon the original consideration after the bill has become due. *Atkinson v. Hawdon*, 2 A. & E. 628.

An alteration in the date of a bill, payable after date. *Wilson v. Justice*, 2 Peake, Ca. 96., *Outhwaite v. Luntley*, 4 Camp. 179.; or by inserting words rendering a bill or note negotiable, which was not so originally, *Kershaw v. Cox*, 3 Esp. 246.; or in the consideration, *Knill v. Williams*, 10 East, 437.; is a material alteration, and requires re-stamping. So where the drawer, without the consent of the acceptor, added the words "payable at Mr. B.'s, Chiswell Street," to the acceptance, this alteration was held to be material; *Cowie v. Halsall*, 4 B. & A. 197., decided after *Rowe v. Young*, 2 B. & B. 165. And a similar alteration has been held to be material, since the statute 1 & 2 G. 4. c. 78.; for the right of an indorsee to sue his indorser would, according to the altered bill, be complete upon default made at the banker's, and notice thereof; whereas, in truth, the acceptor, not having in reality undertaken to pay there, would have committed no default by such non-payment. *Macintosh v. Haydon*, R. & M. 362.; see *Marson v. Petit*, 1 Camp. 82. (n) If the alteration was merely the correction of a mistake in furtherance of the original intent of the parties, as inserting the words "or order" in a bill intended to be negotiable, it will not require a new stamp. *Byrom v. Thompson*, 11 A. & E. 31. So a mistake in the date may be corrected. *Brutt v. Picard*, R. & M. 37. See *Hutchins v. Scott*, 2 M. & W. 809. An alteration in the place of payment mentioned in the acceptance, made by the acceptor at the request of the payee six weeks after the bill had been delivered to the latter, was held to be immaterial. *Walter v. Cubley*, 2 C. & M. 151.

What is such an issuing as to render a subsequent alteration fatal.] A bill is *prima facie* considered as issued as soon as it is passed away by the

drawer, or accepted by the drawee, and not before. *Bayley on Bills*, 93., 4th ed. An exchange of acceptances is an issuing; *Cardwell v. Martin*, 9 East, 190.; but a bill is not issued so as to make an alteration fatal, until it is in the hands of a person entitled to make a claim thereon. *Downes v. Richardson*, 5 B. & A. 674. A bill altered before negotiation, at the request of the acceptor, may be enforced against him. *Ibid.* *Kennerly v. Nash*, 1 Stark. 452.; and see *Jacobs v. Hart*, 2 Stark. 45.; *Stevens v. Lloyd*, M. & M. 292.

The onus of proving that the alteration was made before negotiation lies upon the party suing on it. *Johnson v. Duke of Marlborough*, 2 Stark. 313. *Henman v. Dickinson*, 5 Bing. 183. And where the alteration is visible, it cannot be left to the jury to say, on the mere inspection without further evidence, whether it was made at or after the original making of the bill. *Knight v. Clements*, 8 A. & E. 215.; and *Bishop v. Chambre*, M. & M. 116., there explained.

An objection to a bill or note, for want of a proper stamp, must be taken before it is read. 2 Stark. Ev. 293., 1st ed.

Bills of Sale of Ships.

By 6 G. 4. c. 41. s. 1. bills of sale, assignments, and other instruments for the sale, transfer, or disposition of ships, or of any interest in them, either absolutely or by way of mortgage, are exempted from stamp duty.

Bills of Lading.

Bills of lading for goods, merchandise, or effects to be exported, or carried coastwise, require a 3s. stamp. 55 G. 3. c. 184., schedule, part 1.

Bonds.

A bond, conditioned for the payment by quarterly payments of an annual rent, has been held to be within 48 G. 3. c. 149. (similar provision, 55 G. 3. c. 184.), which imposes a duty on bonds given as a security "for the payment of any definite and certain sum of money," and must be stamped accordingly. *Attree v. Anscomb*, 2 M. & S. 88. But a deed of covenant to pay A. a fixed salary, A. covenanting not to set up a shop within certain limits, with a penalty of 600*l.* on breach by either party, requires only a 35s. stamp. *Mounsey v. Stephenson*, 7 B. & C. 403. The clauses in 48 G. 3. c. 149. and 55 G. 3. c. 184., imposing a stamp upon bonds given as a security for the repayment of any sum to be thereafter lent, advanced, or paid, or which may become due upon an account current, is to be construed as applying to the condition of the bond without regard to the amount of the penalty, which is not to be considered as limiting the extent of the security where such bond is given to secure the payment of a final balance or account stated. *Scott v. Allsopp*, 2 Price, 20. *Williams v. Rawlinson*, 3 Bing. 71. A bond to secure damages and costs, requires a 35s. stamp. *Lopez v. De Tastet*, 8 Taunt. 712. A bond conditioned for the payment of 1000*l.* and interest on a day certain requires only a 5*l.* stamp. *Dixon v. Robinson*, 1 M. & Rob. 115. *Barker v. Smark*, 7 M. & W. 590. So a bond conditioned for the payment of money and interest, and also for the performance of collateral acts, requires only the *ad valorem* stamp appropriated to the principal sum, if

that sum exceed the stamp (1*l.* 15*s.*) which the collateral matter would require if it stood alone. *Dearden v. Binns*, 1 *M. & R.* 130. But where a bond was given to secure 1000*l.* and *banker's charges for commission*, a 5*l.* stamp was held insufficient. *Dickson v. Cass*, 1 *B. & Ad.* 343. *Padon v. Bartlett*, 2 *A. & E.* 9. A bond conditioned to secure a London banker from the balance arising from paying bills, &c., for a country banker, containing a stipulation in the condition that the whole amount of monies to be ultimately recoverable should not exceed the sum of 1000*l.*, does not require a 25*l.* stamp. *Lloyd v. Heathcote*, 1 *C. & M.* 336. In a debt on a bond (with a 1*l.* stamp), to secure a sum due on an indenture of even date, it was held necessary to produce the indenture in order to see whether it required an *ad valorem* stamp. *Walmsley v. Brierly*, 1 *M. & Rob.* 529. But this is not necessary where it appears by recital that the other deed is such an instrument as requires it. *S. C.* and *Quin v. King*, 1 *M. & W.* 42.

Cognovit.

A cognovit requires no stamp, for it is a mere acknowledgment of an account, unless matter of agreement be contained in it; as if it contains an agreement to take the debt by instalments. *Ames v. Hill*, 2 *B. & P.* 150. *Reardon v. Swaby*, 4 *East*, 188. An agreement to grant time, entered into at the same time on a separate paper, does not render an agreement stamp on the cognovit necessary. *Morley v. Hall*, 2 *Dowl. P. C.* 494.

Deeds.

A deed of any kind, not otherwise charged in the schedule of 55 G. 3. c. 184., nor expressly exempted, requires a 35*s.* stamp, with a progressive duty on the number of words above 1080, if the whole number amounts to 2160.

An agreement, under seal, for a lease requires a 35*s.* stamp; for it is neither chargeable as a lease, nor as an agreement not under seal. *Clayton v. Burtenshaw*, 5 *B. & C.* 41.

A deed, indorsed on another deed as a farther security for advances to be made under the first deed, was held exempted by 48 G. 3. c. 149. from the *ad valorem* duty, the first deed being stamped with an *ad valorem* stamp. *Robinson v. Macdonnell*, 5 *M. & S.* 228. A conveyance by debtors to trustees in trust to sell and with the proceeds to discharge, first, debts due to the trustees, and then debts due to other creditors, with a resulting trust for the original debtors, does not require an *ad valorem* stamp as upon a sale or mortgage under 55 G. 3. c. 184. *Coates v. Perry*, 3 *B. & B.* 48.

Foreign Instruments.

If a stamp is necessary to render an instrument valid in one of the British colonies, it cannot be received in evidence without that stamp here. *Clegg v. Levy*, 3 *Camp.* 167. *Alves v. Hodgson*, 7 *T. R.* 241. But, as a general rule, our courts do not take notice of foreign revenue laws; therefore an unstamped receipt, given in France, will be evidence here, though the French law requires that it should be stamped. *James v. Catherwood*, 3 *Dow. & Ry.* 190. A deed, made in England to be carried into effect abroad, must be stamped. *Stonelake*

v. Babb, 5 Burr. 2673. But a contract made at sea requires no stamp. *Ximenes v. Jaques*, 1 Esp. 311. As to the stamp of a bill of exchange drawn in Ireland, but filled up here, *vide ante*, p. 163, 164.

Where, in an action on a bill dated Paris, the defence was that it was drawn in London, and so void for want of a stamp, and it was proved that the drawer was in London on the 3d of March (the bill being dated the 1st), Lord Ellenborough said, "It is not probable that this bill was drawn in Paris 1st March; but if it were proved ever so distinctly that it was not drawn in Paris 1st March, it would not follow that it was not drawn there at some other time, or that it was drawn in England. Drawing here with a foreign date, to evade the stamp duties, is a very serious offence, and the fact must be made out by distinct evidence." *Abraham v. Du Bois*, *Bayley on Bills*, 67. S. C. 4 Camp. 269.

By 1 & 2 Vict. c. 85. deeds and instruments, liable to a stamp duty in one part of the United Kingdom, shall be valid and effectual, though stamped with stamps denoting a duty (of equal or greater amount), payable in another part of the United Kingdom; provided the stamp be not specially appropriated on the face of it to another instrument.

Leases.

By the 55 G. 3. c. 184., the following duties are imposed on leases:—

Lease or tack of any lands, or hereditaments, granted in consideration of a sum of money by way of fine or premium paid for the same, without any yearly rent, or with any yearly rent under 20*l*. (Save and except leases for a life or lives not exceeding three, or for a term of years determinable with a life or lives not exceeding three, by whomsoever granted, and leases for a term absolute not exceeding twenty-one years, granted by ecclesiastical corporations aggregate or sole.)

The same duty as for the conveyance on the sale of lands for a sum of money of the same amount.

Lease of any lands, or hereditaments, at a yearly rent, without any sum of money by way of fine, or premium, paid for the same:

	£	s.	d.
When the yearly rent shall not amount to 20 <i>l</i> . -	1	0	0
And where the same shall amount to 20 <i>l</i> . and not amount to 100 <i>l</i> . - - - -	1	10	0
And where the same shall amount to 100 <i>l</i> . and not amount to 200 <i>l</i> . - - - -	2	0	0
And where the same shall amount to 200 <i>l</i> . and not amount to 400 <i>l</i> . - - - -	3	0	0
And where the same shall amount to 400 <i>l</i> . and not amount to 600 <i>l</i> . - - - -	4	0	0
And where the same shall amount to 600 <i>l</i> . and not amount to 800 <i>l</i> . - - - -	5	0	0
And where the same shall amount to 800 <i>l</i> . and not amount to 1000 <i>l</i> . - - - -	6	0	0
And where the same shall amount to 1000 <i>l</i> . or upwards - - - -	10	0	0

Lease of any land, or hereditaments, granted in consideration of a sum of money by way of fine or premium, and also of a yearly rent amounting to 20 <i>l.</i> or upwards. (Save and except the leases and tacks hereinbefore excepted.)	-	-	-	Both the ad valorem duties payable for a lease in consideration of a fine only, and for a lease in consideration of a rent only of the same amount.
Lease of any kind, not otherwise charged in this schedule	-	-	-	1 15 0
And for the counterpart or duplicate of any lease hereby charged with a duty not exceeding 1 <i>l.</i>	-	-	-	The like duty as on the lease.
And for the counterpart or duplicate of any other lease whatsoever	-	-	-	£1 10 0
And where any such lease, counterpart, or duplicate as aforesaid, together with any schedule, receipt, or other matter put or indorsed thereon, or annexed thereto, shall contain 2160 words or upwards, then for every entire quantity of 1080 words contained therein, over and above the first 1080 words, a further progressive duty of	-	-	-	1 0 0

Exemptions from the preceding and all other Stamp Duties.

Leases of waste or uncultivated lands to any poor or labouring persons, for any term of years not exceeding three lives, or ninety-nine years, where the fine shall not exceed five shillings, nor the reserved rent one guinea per annum; and the counterparts or duplicates of all such leases.

The stamp acts make no distinction between leases under seal, or in writing not sealed. *Doe v. Way*, 1 *T. R.* 735. The stamp required is regulated by the consideration (whether fine or rent) expressed to be paid, and not by that which is actually paid. The misstatement, though punishable, does not avoid it. *Doe v. Lewis*, 10 *B. & C.* 673.

A 3*l.* stamp is not sufficient on a lease reserving 370*l.* for house and land, and, by a distinct reservation, 50*l.* for furniture and fixtures. *Coster v. Cowling*, 7 *Bing.* 457. The plaintiff, a termor, in consideration of 100*l.* and a yearly sum of 75*l.* payable quarterly, by indenture under-leased to the defendant the premises for a longer term than he had in them himself: the counterpart indenture signed by defendant, bearing a 30*s.* stamp, was held inadmissible on an issue on the assignment. And *semble*, a lease operating as an assignment must have an assignment stamp. *Baker v. Gosling*, 1 *New Ca.* 246. Where a lease contained a demise of two farms with two different *habendums* and separate reservations of rents and covenants, some applying to one farm and some to another, one *ad valorem* stamp for the amount of both rents was held sufficient. *Blount v. Pearman*, 1 *New Ca.* 408. *Acc. Parry v. Deere*, 5 *A. & E.* 551.

An instrument purporting to grant a freehold lease, but which is in-

effectual for want of a seal, can only operate as an agreement, and therefore does not require a *lease* stamp. *Stone v. Rogers*, 2 M. & W. 443. A mere attornment does not require a stamp. *Doe v. Edwards*, 5 A. & E. 95. Acc. *Barry v. Goodman*, 2 M. & W. 768.

Where a lease refers to an expired lease for the covenants, the expired lease (stamped as such) is not "a schedule, catalogue, or inventory," within 55 G. 3. c. 184., schedule, part 1., requiring a 25s. stamp. *Strutt v. Robinson*, 3 B. & Ad. 395. When a lease, duly stamped, refers to the terms of an abandoned lease not stamped, the whole may be considered as one lease, and is admissible in evidence as such. *Pearce v. Cheslyn*, 4 A. & E. 225. A lease, containing an agreement to take fixtures, cannot be given in evidence without a lease stamp, though only used in an action for the value of the fixtures, and though it has an agreement stamp. *Corder v. Drakeford*, 3 Taunt. 382.

Policies of Insurance.

The duties payable in respect of marine insurances are now regulated by 8 & 4 W. 4. c. 23.

By 35 G. 3. c. 63. s. 13., "nothing in that act shall be construed to extend to prohibit the making of any alteration, which may lawfully be made, in the terms or conditions of any policy of insurance duly stamped, after the same shall have been underwritten; or to require any additional stamp duty by reason of such alteration; so that such alteration be made before notice of the determination of the risk originally insured, and the premium or consideration originally paid or contracted for exceed the rate of 10s. per cent. on the sum insured; and so that the thing insured shall remain the property of the same person or persons; and so that such alteration shall not prolong the term insured beyond the period allowed by that act; and so that no additional or further sum shall be insured by reason or means of such alteration."

A mere extension of the time of sailing is within the above clause, and the alteration requires no new stamp. *Kensington v. Inglis*, 8 East, 273. *Brockelbank v. Sugrue*, 1 B. & Ad. 81. So a memorandum waiving the warranty of sea-worthiness. *Weir v. Aberdeen*, 2 B. & A. 325. But where a policy on "a ship and outfit" was altered by inserting "ship and goods," it was held to require a new stamp, and to be void against the underwriters, though they had assented to the alteration. *Hill v. Patten*, 8 East, 373.

By statute 5 & 6 W. 4. c. 64. ss. 2 and 3., on a policy on life, where the sum insured does not exceed 50*l.*, the stamp is 2*s.* 6*d.*; where above 50*l.* and not 100*l.*, 5*s.*

Stat. 3 & 4 W. 4. c. 23. exempts policies on farming stock, agricultural produce, and implements of husbandry from duty, provided the insurance be effected by a distinct policy.

Promissory Notes.

By 55 G. 3. c. 184., schedule part 1., a promissory note, for the payment to the bearer on demand of any sum of money, is subject to the following duties:

Stamps.—Promissory Notes.

	£	s.		£	s.	£	s.	d.
Not exceeding.....	1	1	.....	0	0	0	0	5
Exceeding.....	1	1	and not exceeding	2	2	0	0	10
	2	2	.....	5	5	0	1	3
	5	5	.....	10	0	0	1	9
	10	0	.....	20	0	0	2	0
	20	0	.....	30	0	0	3	0
	30	0	.....	50	0	0	5	0
	50	0	.....	100	0	0	8	6

which said notes may be re-issued after payment thereof, as often as shall be thought fit.

A promissory note for the payment in any other manner than to the bearer on demand, but not exceeding two months after date or sixty days after sight, of any sum of money

	£	s.		£	s.	£	s.	d.
Amounting to.....	2	0	and not exceeding	5	5	0	1	0
Exceeding.....	5	5	.....	20	0	0	1	6
	20	0	.....	30	0	0	2	0
	30	0	.....	50	0	0	2	6
	50	0	.....	100	0	0	3	6

These notes are not to be re-issued after being once paid.

Promissory note for the payment either to the bearer on demand, or in any other manner than to the bearer on demand, but not exceeding two months after date, or sixty days after sight, of any sum of money

	£		£	£	s.	d.
Exceeding.....	100	and not exceeding	200	0	4	6
	200	.....	300	0	5	0
	300	.....	500	0	6	0
	500	.....	1000	0	8	6
	1000	.....	2000	0	12	6
	2000	.....	3000	0	15	0
	3000	.....		1	5	0

These notes are not to be re-issued after being once paid.

Promissory note for the payment to the bearer or otherwise, at any time exceeding two months after date, or sixty days after sight, of any sum of money

	£	s.		£	s.	£	s.	d.
Amounting to.....	2	0	and not exceeding	5	5	0	1	6
Exceeding.....	5	5	.....	20	0	0	2	0
	20	0	.....	30	0	0	2	6
	30	0	.....	50	0	0	3	6
	50	0	.....	100	0	0	4	6
	100	0	.....	200	0	0	5	0
	200	0	.....	300	0	0	6	0
	300	0	.....	500	0	0	8	6
	500	0	.....	1000	0	0	12	6
	1000	0	.....	2000	0	0	15	0
	2000	0	.....	3000	0	1	5	0
	3000	0	.....			1	10	0

These notes are not to be re-issued after being once paid.

A promissory note for 40*l.* payable to A. B., or bearer, is in law payable on demand, and requires a 5*s.* stamp. *Whitlock v. Underwood*, 2 *B. & C.* 157. A promissory note payable to M. M., without the words "order" or "bearer," and without any indication of the time of payment, is not a promissory note payable to the bearer on demand within the statute. *Cheetham v. Buller*, 5 *B. & Ad.* 837. So a note whereby A. promised to pay B. on demand 20*l.*, with lawful interest until payment; *Dixon v. Chambers*, 1 *C. M. & R.* 845.; and *Keates v. Whieldon*, 8 *B. & C.* 7., is there said to be overruled.

The reservation of interest is not to be considered an addition to the sum advanced so as to require a larger stamp; thus a stamp, applicable to a note not exceeding 30*l.*, is applicable to a note for the payment of 30*l.* at three months after date, with interest from the date. *Pruessing v. Ing*, 4 *B. & A.* 204.

Where a joint and several note for securing the repayment of a loan was signed first by one, and some days afterwards by the other, party, it was held not to require an additional stamp, if the last signature was put before the money was advanced; or if the party last signing had promised to sign the note before the advance, notwithstanding it may not have been signed till afterwards. *Ex parte White*, 3 *Deac. & Chl.* 366.

A memorandum in the form of a promissory note, offered in evidence for the purpose of taking a case out of the Statute of Limitations, is inadmissible, unless stamped; although 9 *G. 4. c. 14. s. 8.* exempts memorandums made for that purpose from stamp duty. *Jones v. Ryder*, 4 *M. & W.* 32.

An instrument in this form: "Received of A. B. 100*l.*, which I promise to pay on demand," is a promissory note, and requires a stamp as such. *Green v. Davies*, 4 *B. & C.* 235. "I. O. U. 20*l.*, to be paid on the 22d inst.," dated and signed, is an instrument requiring to be stamped either as a note or an agreement. *Brooks v. Elkins*, 2 *M. & W.* 74. "I have received the sum of 20*l.*, borrowed of you, and am accountable for it with interest," was held to be an agreement, and not a note. *Horne v. Redfearn*, 4 *New Ca.* 433.

Protests.

Protest of any bill of exchange, or promissory note, for any sum of money.

	£	£	s.	d.
Not amounting to	20	0	2	0
Amounting to £20, and not amounting to ...	100	0	3	0
£100	500	0	5	0
£500 or upwards		0	10	0

Receipts.

Receipts or discharges given for or upon the payment of money require the following stamps by 55 *G. 3. c. 184.*, schedule, part 1.:

	£	£	£	s.	d.
Amounting to... 5	10	0	0	3	
10	20	0	0	6	
20	50	0	1	0	
50	100	0	1	6	

	£		£	s.	d.
Amounting to 100	100	200	0	2	6
200	200	300	0	4	0
300	300	500	0	5	0
500	500	1000	0	7	6
1000 or upwards.....	1000		0	10	0

When the receipt is expressed or acknowledged therein to
be in full of all demands 0 10 0

A written acknowledgment that a debt on demand has been settled, balanced, or otherwise satisfied, though unsigned, is a receipt within the act. A general acknowledgment of the payment or settlement &c. of a debt, without specifying its amount, or of the receipt of a specified sum in full of any such debt, is to be charged with a 10s. duty. And payment by bills, notes, drafts, or other securities is to be taken as payment of money.

By the statute 3 & 4 W. 4. c. 23. s. 1., receipt stamps for any sum under 5*l.* are abolished.

The following are, among others, exempt from duty : —

Receipts written on bills, notes, or drafts, duly stamped ; or on bills drawn out of, but payable in, Great Britain.

Letters by the post acknowledging the safe arrival of bills, notes, or securities for money.

Receipts on any bond, mortgage, or other security, or on any conveyance deed, or instrument, duly stamped, acknowledging the receipt of consideration money, principal, or interest.

Releases by deed duly stamped.

For further provisions respecting receipts, and the consequence of omitting to have them stamped, see 35 G. 3. c. 55.

An acknowledgment of having received acceptances, with an undertaking to provide for them, has been held to require a receipt stamp. *Scholey v. Walsby, Peake, 24.* So a bill of parcels subscribed "settled by two bills, one at nine, the other at twelve months," was held by Lord Ellenborough to be an acquittance which could not be evidence unless stamped. *Smith v. Kelly, Peake, 25. (n) ; S. C. 4 Esp. 249.* So the word "settled" under a bill. *Spawforth v. Alexander, 2 Esp. 621.* An account containing acknowledgments of sums received, made at successive times upon the payment of the money, requires a stamp ; it differs from an account current, where the sums stated to be received are not written in the account at and upon the receipt of the money, but long after, and only amount to admissions of money received at an antecedent time. *Wright v. Shawcross, 2 B. & A. 501. (n).* See *Jacob v. Lindsay, 1 East, 460. Hawkins v. Warre, 3 B. & C. 696.* A mere acknowledgment, not of the payment of money, but of a sum due and owing (as an I. O. U., signed by the party), requires no receipt stamp. *Fisher v. Leslie, 1 Esp. 426. Israel v. Israel, 1 Camp. 499. Childers v. Boulnois, D. & R. N. P. C. 8. ;* but see *Guy v. Harris, Chitty on Bills, 428., 5th ed.* But such an instrument may, by the addition of other matter, amount to a note or agreement ; see cases, *supra*, p. 171. Where it is made solely to avoid the Statute of Limitations, it is expressly exempted from an agreement stamp. See *ante*, p. 159. An instrument in these terms, "Mr. T. has left in my hands 200*l.*," *Tom-*

kins v. Ashby, 6 B. & C. 541., or in these, "I have in my hands three bills which amount to 120*l.* 10*s.* 6*d.*, which I have to get discounted or return on demand," *Mullett v. Huckison*, 7 B. & C. 639., requires no stamp. So the acknowledgment of the correctness of an account, containing a statement of sums advanced and disbursements made, has been held to require no stamp. *Wellard v. Moss*, 1 Bing. 134. A receipt is not inadmissible, as such, because it notices the terms and consideration upon which the money was paid. *Watkins v. Hewlett*, 1 B. & B. 1. So although it contain subsequent matter of agreement, and has no agreement stamp; *Odye v. Cookney*, 1 M. & Rob. 517.; unless the agreement controls or qualifies what goes before, when the paper will be inadmissible without an agreement stamp. *Grey v. Smith*, 1 Camp. 387. Where the indorsements of receipts on a bond have left no blank space for receipts of subsequent payments to be written on the bond, such receipts, written on an unstamped piece of paper annexed to the bond, are within the exemption of 55 G. 3. c. 184., schedule, part 1., and admissible. *Orme v. Young*, 4 Camp. 336. An unstamped receipt may be used by a witness to refresh his memory. *Rambert v. Cohen*, 4 Esp. 213. See *antè*, p. 131.

Release.

Any deed or instrument of release and renunciation of lands or other property real or personal, or of any right or interest therein (such deed not being otherwise charged in the schedule 55 Geo. 3. c. 184., nor expressly exempted from all duty), requires a stamp of 35*s.*, and a progressive duty on the number of words, as in deeds.

Surrender.

A surrender of a term of years, or of any freehold or uncertain interest in lands &c. not being of copyhold or customary tenure, requires a 35*s.* stamp, and a progressive duty on words, as in deeds.

Where some of the executors of a tenant from year to year signed an instrument, "renouncing and disclaiming, and also surrendering and yielding up" to the landlord all right, title, &c. in the premises; and the landlord thereupon brought ejectment; held that such instrument was a surrender, and not a disclaimer, and therefore could not be put in evidence for the plaintiff without a surrender stamp. *Doe v. Stagg*, 5 New Ca. 564.

COURSE OF EVIDENCE AND PRACTICE AT NISI PRIUS.

When the jury are sworn, the junior counsel for the plaintiff opens the pleadings ; after which, if the proof of the issue rests on the plaintiff, the senior or leading counsel states the case to the jury, and after witnesses have been examined in support of it, the counsel for the defendant is heard. If he calls any witnesses, the plaintiff's counsel has the general reply. Where there are several issues, some of which are incumbent on the plaintiff, and others on the defendant, it is usual for the plaintiff to begin and to prove those which are essential to his case; *Jackson v. Hesket*, 2 Stark. 521. ; the defendant then does the same ; and the plaintiff is then entitled to go into evidence to controvert the defendant's affirmative proofs. The defendant's counsel is entitled to comment by way of reply upon such last-mentioned evidence in support of his own affirmatives; and the plaintiff's counsel to a general reply.

Where a party tenders documentary evidence *primâ facie* admissible, the other party will not be allowed to interpose with evidence for the purpose of excluding it. Thus, where plaintiff tendered an examination of defendant taken before bankruptcy commissioners, the defendant was not permitted to call witnesses to prove, before the examination was read, that it was incomplete and therefore inadmissible. Such evidence, if not obtained by cross-examination, must be postponed as part of the defendant's case. *Jones v. Fort*, M. & M. 196. But evidence to disprove possession of an instrument, of which secondary evidence is tendered, may be given immediately. *Harvey v. Mitchell*, 2 M. & Rob. 366.

It was laid down as a general rule by Lord Ellenborough that when, by pleading or notice, the defence is known, the counsel for the plaintiff is bound to open the whole case in chief, and cannot proceed in parts, unless some specific fact be adduced by the defendant, to which the plaintiff can give an answer ; but that he cannot go into general evidence in reply. *Rees v. Smith*, 2 Stark. 31. And this appears to be still the rule where a single fact or transaction forms the whole subject of dispute between the parties, which is affirmed on one side and denied on the other. Thus, where the plaintiff's title to a mine was in issue, and the plaintiff relied on *primâ facie* evidence arising from possession, he was considered not to be entitled to support his case in reply by general evidence of his title ; *Rowe v. Brenton*, 3 M. & R. 139. 281. ; (on a trial at bar ; but the objection was waived by the defendant). But where the defendant traverses, and also specially justifies, the plaintiff may reserve his case on the special pleas until the defendant has proved them ; *Browne v. Murray*, R. & M. 254., and note *ib.* ; or he may enter upon the disproof of them in the first instance ; in which case he will not be allowed to give further evidence of the same kind in reply. S. C. Where the plaintiff sued on several bills of exchange, and defendant pleaded a set-off, the plaintiff was allowed to prove the balance in the first instance, and then, after the defendant had proved his set-off, to prove further sums due, so as to exceed the set-off ; and per Lyndhurst C. B., " Either way may be correct, and it must be left to the discretion of the judge." *Williams v. Davies*, 1 C. & M. 464.

Both parties are bound by the view taken of their respective cases, and the mode of conducting them, by their counsel at the trial ; and if the verdict be against them, they cannot move for a new trial upon grounds omitted to be enforced at *Nisi Prius*. See *Doe v. Needs*, 2 *M. & W.* 129. *Henn v. Neck*, 3 *Dowl. P. C.* 163. *Short v. Kalloway*, 11 *A. & E.* 28. And where counsel offers evidence for one purpose which the judge rejects, he will not, after the trial, be permitted to rely upon it as admissible for another purpose. *R. v. Grant*, 5 *B. & Ad.* 1081. Nor can he complain of misdirection upon a point which he has, in effect, waived at *Nisi Prius*. *Robinson v. Cook*, 6 *Taunt.* 336. And where evidence has been admitted, without objection, as relevant to the issue, it cannot be objected to as inapplicable after the judge has begun to sum up. *Abbott v. Parsons*, 7 *Bing.* 563. Where the judge has, in the opinion of counsel, omitted to submit some material point or view of the case to the jury, he ought, it seems, to be reminded of it. See *Magor v. Chadwick*, 11 *A. & E.* 584, 585. *Wedge v. Berkeley*, 6 *A. & E.* 663. But counsel will not, it is apprehended, be taken to have acquiesced in the summing up of the judge in point of law, merely because he has not interposed at the time.

When the plaintiff is to begin.] It is often a subject of inquiry whether the plaintiff or the defendant is to open the facts and evidence to the jury. This may be an advantage, and is then claimed as a right ; as where evidence is anticipated on the opposite side which will give a right to reply generally on the whole case ; or it may be a burden ; as where a party relies on the witnesses of his opponent, or on the difficulty of the proofs incumbent on him.

The right, or obligation, to begin depends on the form of the issue and on the rules respecting the *onus probandi* (see *antè*, p. 71.) ; and the test has been said to be, not on which side the affirmative lies, but which side will be entitled to a verdict if no evidence be given. Thus, where the plaintiff declared for unworkmanlike execution of a contract, and defendant pleaded that it was executed in a workmanlike way, and thereupon issue was joined, it was held that plaintiff was to begin ; for it was not to be assumed that the work was bad ; per Alderson B., *Amos v. Hughes*, 1 *M. & Rob.* 464. So where, in an action by indorsee against acceptor, defendant pleaded that the bill was for the drawer's accommodation, and that plaintiff did not give any consideration to the drawer ; to which plaintiff replied that it was indorsed to him by the drawer for a good consideration : held that, as a consideration is presumed, the defendant must begin by proving the want of it, or some suspicious circumstances to throw the proof on the plaintiff. *Mills v. Barber*, 1 *M. & W.* 425. Acc. *Lewis v. Parker*, 4 *A. & E.* 838. Where, in a declaration on a policy on a life, the plaintiff averred that the deceased had led a temperate life, which was denied by the plea ; held that the *onus probandi*, and therefore the right to begin, was with the plaintiff ; though it was contended that intemperance was not to be presumed. *Huckman v. Fernie*, 3 *M. & W.* 505. Acc. *Rawlins v. Desborough*, 2 *M. & Rob.* 70. But where the declaration set out a policy conditioned to be void in case of misrepresentation as to the habits and health of the deceased, and averred that there was no misrepresentation ; and the pleas relied on an untrue statement in this, to wit, that the habits of deceased were prejudicial to health, and his health was

unsound ; to which *de injuriâ* &c. was replied ; Tindal C. J. held that defendant was to begin. *Pole v. Rogers*, 2 M. & Rob. 287. Where an issue on the sanity of a person is directed by Chancery, the court will presume that the person ordered to be plaintiff is to begin. *Frank v. Frank*, *ib.* 314.

In many cases where damages, and not the decision of a mere right, have been the object of an action, defendants have been used so to plead as to take an affirmative issue on themselves, and thereby exclude the plaintiff's right to a general reply. The judges have, however, come to a resolution, which has been stated in the following terms : " In cases of slander, libel, and other actions, where the plaintiff seeks to recover actual damages of unascertained amount, he is entitled to begin, although the affirmative of the issue may, in point of form, be with the defendant." *Carter v. Jones*, 1 M. & Rob. 281. ; S. C. 6 C. & P. 64. The rule has been stated somewhat differently, and has been, in some cases, confined to " personal injuries, as assaults, libel, &c." Parke B., in *Wootton v. Barton*, 1 M. & Rob. 518. ; and, in others, to cases where the action is brought for " malicious injuries, where the amount of damage is not matter of calculation, but is liable to be increased by matter urged in aggravation." Tindal C. J., in *Reeve v. Underhill*, *id.* 440. Hence covenant for damages, though unascertained, is not within it. S. C. So trespass *de bonis*, where the real question is the rateability of the plaintiff's house. *Burrell v. Nicholson*, *id.* 304. So in trespass, *q. c. f.*, where the defendant pleaded a custom to divert water, which was traversed by the plaintiff, the defendant was allowed to begin ; though the plaintiff's counsel asserted his intention to ask for heavy damages. *Bastard v. Smith*, 2 M. & Rob. 129. ; and, *per* Tindal C. J., " The plaintiff might have traversed the custom and new assigned excess, and then would have had a right to begin." *Ibid.* 132.

In the case of *Absalom v. Beaumont*, 1 M. & Rob. 441. (n), Lord Denman is said to have ruled that, " wherever any affirmative proof lies on the plaintiff to shew what damages he is entitled to, he has a right to begin." That case was an action on a policy against fire, and all the pleas were affirmative ; and his lordship is said to have distinguished the case from a life insurance, where the sum is ascertained ; see *dict. arguendo* in *Bastard v. Smith*, *suprà*. In *Cann v. Facey*, *cor.* Gurney B., Exeter Sum. As. 1835, in an action of trespass for shooting a dog, where defendant justified to prevent it from trespassing, the plaintiff was held entitled to begin, though the defendant offered to admit the value of the dog ; for, *per* Cur., " the plaintiff may have damages beyond that amount ;" and a similar ruling by Lord Tenterden was cited. So in *Mills v. Stephens*, Exeter Spring As. 1838, Bosanquet J. held that plaintiff had a right to begin in a case of trespass for breaking into his house, where the issue was on a plea of leave and license.

Where any one of several issues throws the *onus* of proof on the plaintiff, he has a right to begin as to all ; *Rawlins v. Desborough*, 2 M. & Rob. 328. ; and it has been held in an action for a libel, that judgment by default as to part has the same effect, though the defendant pleads affirmatively as to the residue. *Wood v. Pringle*, 1 M. & Rob. 277. But where, to an action on a bill and on an account stated, defendant pleaded payment to the first, and non-assumpsit to the second count, it was held that plaintiff has no right to begin unless he have some evidence to offer of the account stated besides the bill. *Smart v.*

Rayner, 6 C. & P. 721., per Parke B. S. P. ruled by Creswell J., in *Lanyon v. Davey*, Bodmin Sum. As. 1842. The plaintiff in replevin has the same right as in other actions, though both parties are actors. *Curtis v. Wheeler*, M. & M. 493.

Where, by rule of court, the defendant is under an obligation to admit the plaintiff's case, this does not deprive the latter of his right to begin. *Thwaites v. Sainsbury*, 5 C. & P. 69.

When the defendant is to begin.] Subject to the rule laid down in the last section, where the general issue is not pleaded, but issue is joined upon a collateral matter (as on a release in assumpsit or debt, or a right of way in trespass) the proof of which rests on the defendant, his counsel begins, after the pleadings are opened, and has the general reply. *Cotton v. James*, M. & M. 275. Thus, in trespass, where the general issue is pleaded only as to the coming with force and arms, &c., and a justification as to the rest, the issue lies upon the defendant. *Jackson v. Hesket*, 2 Stark. 518. So, where *lib. ten.* is pleaded and no general issue. *Pearson v. Coles*, 1 M. & Rob. 206. So, where the defendant, a constable, being sued in trespass, pleaded a justification without the general issue, it was held that his counsel, admitting the demand of a copy and perusal of the warrant (24 G. 2. c. 44.), was entitled to begin. *Burrell v. Nicholson*, 1 M. & Rob. 305. Where the defendant pleads a plea averring notice, and issue is taken on the fact of notice, the defendant begins. *Warner v. Haines*, 6 C. & P. 666. So where a defendant in replevin pleads property in a third person, A. B., and not in the plaintiff, to which plaintiff replies that the property is not in A. B., but in the plaintiff, and concludes to the country, the defendant is entitled to begin. *Colstone v. Hiscobbs*, 1 M. & Rob. 301. But where the plea avers affirmative matter, and concludes with a special traverse of a part of the declaration on which issue is joined, the plaintiff, and not the defendant, begins; per Parke B., *Crowley v. Page*, 7 C. & P. 789.; unless the defendant traverses matter of common right; as where plaintiff avers the liability of the whole parish to church rates, and defendant pleads the exemption of a part of it with a traverse of the liability of the whole, on which issue is taken; the onus of proof lies on defendant. *Craven v. Sanderson*, 4 A. & E. 666. On an issue in error to avoid an outlawry because plaintiff was beyond seas, plea that plaintiff went abroad fraudulently to defeat the outlawry and issue thereon; held that defendant was to begin. *Bryan v. Wagstaff*, R. & M. 327.

Ejectment.] In some cases, by admitting a title in the plaintiff the defendant may entitle himself to begin. This usually occurs in ejectment where the form of pleading is too general to indicate the precise point in issue. Thus, where plaintiff claims as heir-at-law, and defendant as devisee, the defendant, by admitting plaintiff's pedigree, may entitle himself to begin and to reply. *Doe v. Braham*, 4 T. R. 497. Acc. *Fenn v. Johnson*, *Adam's Eject.* 256., 2d ed.; though Gibbs, C.J., in a similar case, refused to compel the plaintiff to receive such admissions, and thereby to deprive him of his right to begin. So in ejectment by a person claiming under a will against another claiming under a codicil, the defendant, having admitted the will, was held to have the right of beginning. *Doe v. Corbett*, 3 Camp. 368. See *Peake Ev.* 6.(n), 5th ed.

So where plaintiff claimed as devisee of the heir-at-law of A., and the defendant claimed as devisee of A., the defendant's counsel was permitted to begin, on admitting that plaintiff was entitled to recover, unless defendant proved A.'s will. *Doe v. Barnes*, 1 M. & Rob. 386. In that case it was contended that defendant must admit the whole of the plaintiff's case, which involved the seisin in fee of A.'s heir-at-law after A.'s death : but, *per* Lord Denman C. J., " If the titles had been deduced in the pleadings, the issue must have been on the will : " and his lordship referred to a case where the lessor of the plaintiff claimed under a prior will, and the defendant under a subsequent will, and the defendant, admitting the prior will, was permitted to begin. So where the defendant claimed as devisee and admitted the heirship of the lessor of the plaintiff, he was allowed to begin, although one of the lessors of the plaintiff had, since the death of the testator, become assignee of an outstanding term in part of the land ; for " the real question in dispute is the validity of the will." *Per* Gurney B., after conferring with Patteson J., in *Doe v. Smart*, 1 M. & Rob. 476., and *MS.*

In order to entitle the defendant to begin by admitting the plaintiff's case, he must admit the whole, without qualification. *Doe v. Wilson*, 1 M. & Rob. 323. Therefore, where the lessor of plaintiff claims as the heir of A., and defendant under a conveyance by A. in his lifetime, the latter cannot deprive the plaintiff of the right to begin by admitting the heirship of the lessor and seisin of A. *unless* defeated by the conveyance ; *Doe v. Tucker*, M. & M. 536. ; for it is part of the plaintiff's case that A. died seised. So where each party claimed as heir, and defendant admitted that plaintiff was entitled as heir *if* defendant was not legitimate, held that he could not by so doing obtain a right to begin. *Doe v. Bray*, M. & M. 166.

Who is to begin on a plea in abatement.] Which party is entitled to begin upon an issue joined on a plea in abatement, has been the subject of conflicting decisions. In an action on a bill of exchange, where the non-joinder of a joint contractor was pleaded in abatement, Lord Tenterden permitted the defendant to begin, and said, " That the most convenient rule was, that wherever it appears on the record, or by the statement of counsel, that there is really no dispute about the sum to be recovered, that the damages are either nominal or mere matter of computation, then, if the affirmative is on the defendant, he is entitled to begin." *Fowler v. Coster*, M. & M. 241.

But where the amount is disputed, the plaintiff is to begin ; thus in *indebitatus assumpsit* for goods sold, plea non-joinder of others as defendants, Lord Denman ruled that plaintiff should begin, but that the defendant might do so by admitting the amount claimed. *Morris v. Lotan*, 1 M. & Rob. 233. So where defendant pleaded her coverture to an action for goods sold, her counsel was permitted to begin only on condition of admitting the delivery of goods to the amount claimed. *Lacon v. Higgins*, 3 Stark, 178. *per* Abbot C. J.

On the other hand it has been sometimes held, that the question of damage is a distinct inquiry that never arises until the issue on the plea is determined, and that it ought not therefore to regulate the right to begin. See *Jackson v. Hesketh*, 2 Stark. 518., and the note of the reporters, in *Cotton v. James*, M. & M. 278—281.

Mr. Starkie (*Evid.* vol. ii. p. 1., 2d ed.) considers the order of proof

to be discretionary with the court, such discretion to be governed by a consideration of convenience in each case.

When the plaintiff is allowed to begin, he may, it seems, confine himself to proof of the damages, and reserve his case in reply to the plea. *Stansfeld v. Levy*, 3 Stark. 8.; but see *Lacon v. Higgins*, *ib.* 178.

Discretion of judge as to right to begin.] It has been doubted by the court of K. B., whether an erroneous ruling of the judge as to the right to begin could be the subject of a motion for a new trial. *Burrell v. Nicholson*, 1 M. & Rob. 304. *Bird v. Higginson*, 2 A. & E. 160. But the court of Exchequer have intimated that a clear case of error, by which an undue advantage has been given to the successful party, would be ground of new trial. *Huckman v. Fernie*, 3 M. & W. 505.

Right to reply.] In general, the party who begins has the right to the general reply, when the opposite party calls witnesses. Where the defendant brings evidence to impeach the plaintiff's case, and also sets up an entirely new case, which again the plaintiff controverts by evidence, the defendant's reply is confined to the new case set up by him; for upon that relied on by the plaintiff the defendant's counsel has already commented in the opening of his case; and the plaintiff is then entitled to the general reply. 1 Stark. Ev. 384., 1st ed.

Unless the defendant gives evidence, the plaintiff is not entitled to reply; there being no new facts upon which his counsel can comment. With regard to what shall be considered evidence on the part of the defendant, it has been held that where the defendant proves a payment to the plaintiff by showing the particulars of demand delivered under a judge's order in which credit is given for the amount, this is the evidence of the defendant, and entitles the plaintiff to reply. *Rymer v. Cook*, M. & M. 86. (n). This decision, however, was before the rule requiring the annexation of the particulars to the declaration; since which they require no proof. *Ante*, p. 57. Where the defendant, on being called on by the plaintiff to produce a document, interposes with evidence to show it not in his possession, this gives no general reply. *Harvey v. Mitchell*, 2 M. & Rob. 366.

Where the counsel for the defendant opens facts to the jury, which he calls no witnesses to prove, it is in the discretion of the judge to permit the plaintiff's counsel to reply. *Crerar v. Sodo*, M. & M. 85. And where the defendant's counsel has read a paper, or made statements of material facts likely to have weight with the jury, without attempting to prove them, both Lord Kenyon and Lord Tenterden permitted a general reply. *R. v. Bignold*, D. & R. N. P. C. 59.

Where the defendant's counsel goes for a nonsuit on a point of law, and the plaintiff's counsel answers it, the defendant's counsel has a right to reply upon the law only. *Arden v. Tucker*, 1 M. & Rob. 192.

Arguments of counsel.] When points of law arise incidentally, all the counsel on both sides are usually heard by the court; and the leading counsel of the party making the objection, or submitting the point, alone, replies. But on the claim of a right to begin, Lord Denman has ruled that one counsel only is to be heard on each side. *Rawlins v. Desborough*, 2 M. & Rob. 70. This rule, however, is not always adhered to. See *Bastard v. Smith*, *ib.* 132.

The objection of a witness to a question which he considers himself not bound to answer is not a point on which counsel are heard. *R. v. Adey*, 1 *M. & Rob.* 94., *antè*, p. 125.

Where the party conducts his case, addresses the jury, and examines witnesses in person, it is questionable how far counsel can be heard for him on a point of law. *Shuttleworth v. Nicholson*, 1 *M. & Rob.* 254. *Moscatti v. Lawson*, *ib.* 454. In the latter case, Alderson B. said that, though there were many precedents, it was a very objectionable practice.

Addressing the jury and examining witnesses.] In an action for goods sold, in which the defendants appeared and pleaded non-assumpsit by separate attorneys and counsel, but relied on the same defence, viz. payment, it was ruled by Gibbs C. J., that the senior counsel could alone address the jury, and the witnesses were to be examined by the counsel successively, in the same manner as if the defence were joint and not separate. "It cannot be left in the power of defendants, whose interests are the same, to make twenty cases out of one." *Chippendale v. Masson*, 4 *Camp.* 174. And in ejectment where the defendants defended in the same right, but by different attorneys and counsel, Lord Tenterden ruled that only one counsel could address the jury. *Doe v. Tindal*, *M. & M.* 314. So in trover and a joint plea; *Perring v. Tucker*, *M. & M.* 392. So in *Mason v. Ditchbourne*, 1 *M. & Rob.* 462. (n), in debt on bond, plea *non est factum*, Lord Abinger refused to allow two counsel to address the jury, for "there could not be a verdict for one, against the other, defendant." But in an action *ex delicto*, where defendants have pleaded and appeared by separate attorneys and counsel, a separate cross-examination and address have been permitted by Abbott C. J.; *King v. Williamson*, 3 *Stark.* 162.; and by Tindal C. J.; *Massey v. Goyder*, 4 *C. & P.* 162., and *Southey v. Tuff*, *C. P.*, sittings after T. T. 1834, *MS.*; and even in *assumpsit*, under similar circumstances, the same course was allowed and was approved by the court *in banc*; *Ridgway v. Philip*, 1 *C. M. & R.* 415.; in which case, however, it appears, by another report, that one of the defences was mis-joinder of defendants as partners. *S. C.* 3 *Dowl. P. C.* 154. In *King v. Williamson*, *suprà*, only one counsel was allowed to examine those witnesses who had been subpoenaed by both defendants.

In cases where the defendants have no right to a separate address or examination, yet the counsel of any will be heard on a legal objection; as that there is no evidence against one of them; *per* Tindal C. J. in *Poole v. Sidden and another*, *C. P.* sittings after M. T. 1832, *MS.* (on the general issue to *indeb. assumpsit*.)

When two are made defendants in an issue out of Chancery whose interests are at variance with each other, the counsel of each will be allowed to address the jury, and prove his case separately and in succession; the witnesses of each may be cross-examined by the co-defendant's, as well as the plaintiff's, counsel; and the plaintiff will have the general reply. *Phillips v. Willetts*, 2 *M. & Rob.* 319., and *Wynne v. Wynne*, cited *ibid.*

Where it is ordered, on an issue out of Chancery, that a third party "shall be at liberty to attend the trial," the counsel for such party may cross-examine and suggest points of law, but cannot call witnesses or address the jury. *Wright v. Wright*, 7 *Bing.* 458.

A party appearing in person must examine the witnesses as well as address the jury. *Shuttleworth v. Nicholson*, 1 M. & Rob. 254.

The leading counsel has a right, in his discretion, to interpose and take the examination of a witness out of the hands of his junior; but after one counsel has brought the examination to a close, a question cannot regularly be put to the witness by another counsel on the same side. *Doe v. Roe*, 2 Camp. 280.

Counsel for the defendant, in addressing the jury, has no right to ask them whether they are satisfied that defendant is entitled to a verdict as the case stands without calling witnesses. *Lyndhurst C. B.*, in *Moriarty v. Brooks*, 6 C. & P. 684.

The plaintiff's counsel cannot be called upon by the defendant to elect upon what count or demise he proposes to rely. *Swinburn v. Jones*, 1 M. & Rob. 323. Acc. *Doe d. Bassett v. Mew*, cor. *Littledale J.*, *Winton Spr. As.* 1836.

Demurrer to Evidence.] If a party wishes to withdraw from the jury the application of the law to the fact, and all considerations of what the law is upon the fact, he then demurs in law upon the evidence; and the precise operation of that demurrer is, to take from the jury and to refer to the judge, the application of the law to the fact. *Gibson v. Hunter*, 2 H. Bl. 206. The question on demurrer is, "whether the matters shewn in evidence, admitting them to be true, be sufficient to maintain the issue." Where a probate was left to the jury only as evidence of a will of personalty, and not as conclusive, a demurrer, and not a bill of exceptions, was held to be proper. *Chichester v. Phillips*, T. Ray. 404. See the form of demurrer and joinder, *Tidd's Forms*, 372., 6th ed. The reason why a demurrer is resorted to is, that the jury may find a general verdict, and so the facts will not appear on the record; per *Buller J.*, in *Cocksedge v. Fanshaw*, 1 Doug. 134. But the discretionary power of the court to grant new trials has, to a certain extent, dispensed with the necessity of demurrers, as well as bills of exceptions. 3 Bl. Com. 373. If the question is on the admissibility of evidence tendered, and a judge admits it, a bill of exceptions, and not a demurrer, is proper. B. N. P. 314. *Gibson v. Hunter*, 2 H. Bl. 205. On a demurrer to circumstantial evidence the party, offering the evidence, is not obliged to join in demurrer, unless the party demurring will distinctly admit upon the record every fact and every conclusion which the evidence offered conduces to prove. *Gibson v. Hunter*, *supra*. But where the evidence is certain; as where it consists of matter of record, or other matter in writing; the party offering the evidence may be compelled to join in demurrer, or waive the evidence. *Id.* 206. The whole proceeding of a demurrer to evidence is under the control of the judge before whom the trial is had, who may overrule the demurrer if it be frivolous or the law be clear; upon which the party demurring may tender a bill of exceptions. *Id.* 208. Where a demurrer to evidence is admitted, it is usual for the court to give orders to the associate to take a note of the testimony, which is signed by the counsel on both sides, and the demurrer is affixed to the *postea*. *Tidd's Pr.* 916. B. N. P. 313. The demurrer is then remitted for argument to the court out of which the record issued, and not (as on a bill of exceptions) to the next superior court. 3 Bl. Com. 372. And error lies on the judgment upon the demurrer. *Gibson v. Hunter*, 2 H. Bl. 201. The damages

may be assessed either by the principal jury, conditionally, before they are discharged; or by another jury upon a writ of inquiry after the demurrer is determined; and it is said to be the most usual course, when there is a demurrer to evidence, to discharge the jury without further inquiry. *Tidd, ubi supra.*

A demurrer to evidence lies in an inferior court, as the Palace Court. *Fitz-Harris v. Boium*, 1 *Lev.* 87.

Bill of Exceptions.] A bill of exceptions lies upon some point of law, either in admitting or refusing evidence, or a challenge, or some matter of law arising upon facts not denied, in which either party is overruled by the court. *B. N. P.* 316. So, for improperly directing a nonsuit; *Strother v. Hutchinson*, 4 *New Ca.* 83.; but see *Doe v. Fisher*, 2 *Bligh*, *N. S.* 9.; or for telling the jury there is evidence to prove the issue, when there is none. *Bulkeley v. Butler*, 2 *B. & C.* 434. 445. *per Best J.*; but see *Holroyd J.*, *ib.* 443. It lies upon a trial at bar; *Rowe v. Brenton*, 3 *M. & R.* 266.; and for the direction of the sheriff to a jury in a county court. *Strother v. Hutchinson, supra.* If such bill be tendered, and the exceptions in it are truly stated, then the judge (by statute *Westm. 2. 13 Ed. 1. c. 31.*) ought to set his seal in testimony that such exceptions were taken at the trial; but if the bill contain matters false, or untruly stated, or matters in which the party was not overruled, he is not obliged to affix his seal. *B. N. P.* 316. The bill of exceptions must be tendered at the trial, and the substance of it reduced into writing at the time, but it may be formally drawn up afterwards. *Ib.* As a bill of exceptions can only be argued on error or false judgment, where no writ of that kind lies there can be no bill of exceptions. *Ib.* *Strother v. Hutchinson, supra.* On a bill of exceptions, the court of error may look at the whole evidence set out to see whether the verdict is sustained; at least where the bill sets out the whole, and the exception is not confined to one point. *Vines v. Reading*, 1 *Y. & J.* 4. *Acc. Smyth v. Latham*, 1 *C. & M.* 568.

Nonsuit — Point reserved.] The plaintiff may elect whether he will submit to a nonsuit, or go to the jury. *Watkins v. Towers*, 2 *T. R.* 281. And if he submits to a nonsuit, he cannot afterwards move to set it aside, although he chose to be nonsuited because he apprehended the effect of the judge's comments on his case. *Simpson v. Clayton*, 2 *New Ca.* 467. *Austin v. Evans*, 2 *M. & G.* 430. But if he submits merely out of deference to the opinion of the judge that there ought to be a nonsuit, he will not be precluded from moving the court to set it aside. *Alexander v. Barker*, 2 *C. & J.* 136. Where an objection is taken on behalf of a defendant with a view to a nonsuit, and is overruled by the judge, the defendant's counsel should apply for leave to move to enter a nonsuit, otherwise the misdirection of the judge will be only ground of new trial. *Minchin v. Clement*, 1 *B. & A.* 252.; and see *Hill v. Thompson*, 8 *Taunt.* 402. The effect of reserving a point for a nonsuit is, that the plaintiff consents to let a nonsuit be entered in case the court above shall think fit, on condition that the cause proceeds to a verdict; and therefore, if the jury are afterwards from necessity discharged without a verdict, or the judge irregularly nonsuits without the plaintiff's consent, the defendant cannot, on a motion by plaintiff for a new trial, argue the point reserved. *Dewar*

v. Purday, 3 A. & E. 166. As the plaintiff cannot be nonsuited except by his own consent, his counsel may prevent a point from being reserved for that purpose by the defendant, unless he will consent that the court above shall have the same power of amending as the judge at Nisi Prius; and this is sometimes done where the objection involves a point of variance.

Where there is judgment by default against one of two defendants, the plaintiff may be nonsuited, as against the other, who has pleaded. *Murphy v. Donlan*, 5 B. & C. 178. So he may be nonsuited after payment of money into court; *Gutteridge v. Smith*, 2 H. Bl. 374.; or after a plea of tender. *Anderson v. Shaw*, 3 Bing. 290. So in replevin, though the record is tried on the defendant's writ of Nisi Prius. *Mann v. Loejoy*, R. & M. 357. So in case of trial by proviso. *Anderson v. Shaw*, *supra*. But the plaintiff cannot be nonsuit as to one defendant and have a verdict against the other, where both plead to issue. *Revett v. Broune*, 2 M. & P., 18. Where there are several issues, some found for plaintiff, others for defendant, liberty may be reserved to enter a nonsuit. *Shepherd v. Bishop of Chester*, 6 Bing. 435.

The plaintiff may be nonsuited in an undefended cause, and the court may in such case nonsuit him, with liberty to enter a verdict: for such a reservation in the hearing of the jury is an implied assent by them. *Treacher v. Hinton*, 4 B. & A. 413. And by the same tacit assent of the defendant and of the jury, the plaintiff in a *defended* cause may be nonsuited, with liberty to enter a verdict. See *Rapp v. Latham*, 2 B. & A. 797. Plaintiff may elect to be nonsuited while the jury are deliberating. *Per Cur.* in *Anderson v. Shaw*, 3 Bing. 291, 292. After the defendant has addressed the jury and examined witnesses, he cannot insist on a ground of nonsuit. *Roberts v. Croft*, 7 C. & P. 376. A bill of exceptions lies, if a judge improperly directs a nonsuit. *Strother v. Hutchinson*, 4 New Ca. 83. Or the plaintiff may move for a new trial.

Where the defendant intends to insist that plaintiff has not given material evidence in the county in which the venue is laid, according to his undertaking, he must take the objection at Nisi Prius; *How v. Pickard*, 2 M. & W. 373.; and if a question incidentally arises as to the boundary of the county, it is incumbent on the plaintiff to satisfy the judge that the place, where the evidence arose, is within it. *Thomson v. Brune*, Q. B. H. T. 1842. As the rule is usually obtained before plea pleaded, it is considered as having reference to the declaration; if therefore the defendant pleads, specially, an affirmative fact, as a tender, &c., the undertaking is waived. *Cockerell v. Chamberlayne*, 1 Taunt. 518. Putting letters to the defendant into the post-office in the county, containing invoices of the goods sold, satisfies the undertaking in an action for goods sold, though the letters were not answered. *Linley v. Bates*, 2 C. & J. 659. Evidence bearing on the amount of damages is sufficient. *Greenway v. Titchmarsh*, 7 M. & W. 221. In *Thomson v. Brune*, cited *supra*, the court was inclined to think that a royal charter, produced from the proper repository within the county, would have satisfied the rule. It is observable that the terms of the undertaking differ in some degree in the different courts.

Where the judge at Nisi Prius thought a special plea, found for the defendant, bad in law; and also doubted whether the evidence entitled the defendant to a verdict on it; he directed the jury to assess damages at all events under the general issue, and gave the plaintiff leave to

enter a verdict for those damages in case the court above thought the proof insufficient: and the court, being of opinion that the proof was insufficient, permitted a verdict to be entered accordingly. *Timothy v. Simpson*, 1 C. M. & R. 757.

Amendment at assizes.] Formerly, no amendment of a record could be made unless the judge at Nisi Prius happened also to be a judge of the court from which the record was sent for trial; but now, by 1 G. 4. c. 55., the justices of the superior courts at Westminster may, during their circuits, grant like summonses and make like orders in all actions, depending in any of those courts in which the issue would, if tried, be tried upon such their respective circuits, as if they had been judges of the court in which the actions are depending.

In ejectment, where there was a mistake in the description of the land demised, an amendment was permitted at Nisi Prius before the cause was called on; and *per Best C. J.*, "If the defendant came down to trial merely on this formal defence, I will not allow the plaintiff to amend but on the terms of paying defendant's costs up to this time, and upon defendant's giving up possession. If the defendant has a real defence he will not be prejudiced by the amendment, and the plaintiff must pay the costs of the application only." *Doe v. Coles*, R. & M. 380., (before the Acts for the amendment of variances). An amendment of the Nisi Prius record by inserting the date of the writ has been allowed. *Cox v. Painter*, 1 Nev. & P. 581. So by indorsing on the *distringas* the execution thereof; for which purpose the plaintiff's attorney was permitted to withdraw and re-enter the record. *Masters v. Lewis*, 2 M. & Rob. 59. So an *indebitatus* count, on which defendant had paid money into court, and which was inserted in the declaration and issue delivered, but omitted by accident in the record, was added at Nisi Prius. *Ernest v. Brown*, *ib.* 13. But where the plea had been omitted, Lord Tenterden would not allow the plaintiff to amend at Nisi Prius; on the ground that the case was one of gross negligence, and that "laxity in allowing amendment did more harm than good;" and the cause was struck out; *Whitehead v. Scott*, 1 M. & Rob. 137. (n); nor would he permit the plaintiff to strike out words improperly inserted by his attorney on the record, when it was taken away to be resealed. *Drummond v. Burt*, *ib.* 136. When the demise in ejectment had expired, Parke J. refused to amend by extending it after the cause was called on. *Doe v. Hay*, *ib.* 243. And the court will not put off a trial to enable the plaintiff to amend by inserting an excuse of *profert*, instead of a *profert*, of a bond. *Paine v. Bustin*, 1 Stark. 74. A *similiter* has been allowed to be added by consent at the trial, and the jury re-sworn, *per Parke B.*, *Dyson v. Warris*, 1 M. & Rob. 474. Acc. *Wright q. t. v. Horton*, 6 M. & S. 50.; and *per Cur.* in *Siboni v. Kirkman*, 3 M. & W. 48., "on the parties going down to trial, the clerk ought to make up the Nisi Prius record by inserting the *similiter*, although omitted by the party." But where there is a material error on the record, which is involved in the issue, and which is not discovered till the jury are sworn, the judge will not amend except on the ground of variance. Thus, where a plea justified a battery in defence of the plaintiff's (instead of the defendant's) servant, to which *de injuriâ* &c. was replied and issue joined, and the jury were sworn, Cresswell J. refused to

amend unless by consent. *Sarah v. Williams*, Bodmin Summer Ass. 1842. See also *Doe v. Hay*, 1 M. & Rob. 243.

Where a cause was referred at Nisi Prius, and the arbitrators had had a meeting, it was held that the judge of assize had no power afterwards, during the assizes, to give the defendant liberty to deliver particulars of set-off in order to enable him to give the set-off in evidence. *Ashworth v. Heathcote*, 6 Bing. 596.

As to amendment of variances, see *antè*, p. 67.

Withdrawing a juror.] Sometimes a juror is withdrawn, or the jury discharged, by consent, either for the convenience of the parties or at the suggestion of the judge. In such case, each party pays his own costs, but the action is not thereby determined. *Everett v. Youells*, 3 B. & Ad. 349. But when this has been done at Nisi Prius upon the understanding that no further proceedings are to be taken in the cause, but that all matters in difference, independent of the cause, are to be referred, the court in banc will not permit further steps to be taken, or a fresh action to be brought, even where the award is set aside. *Harries v. Thomas*, 2 M. & W. 32.

Immediate execution — Certificate under 11 G. 4. & 1 W. 4. c. 70. s. 38. in Ejectment.] By this statute it is enacted, that "in all cases of trials of ejectment at Nisi Prius, when a verdict shall be given for the plaintiff, or the plaintiff shall be nonsuited for want of the defendant's appearance to confess lease, entry, and ouster, it shall be lawful for the judge, before whom the cause shall be tried, to certify his opinion on the back of the record that a writ of possession ought to issue immediately; and upon such certificate a writ of possession may be issued forthwith." The 1 W. 4. c. 7. s. 6., as to speedy execution, does not affect the above clause.

The judge has no discretion under this act as to the time within which execution shall issue, but he must either direct it to be immediate, or allow the case to take its regular course. *Doe v. Dawson*, 4 C. & P. 589. Though, where he is of opinion that some time ought to elapse before possession is taken, he will grant the certificate on an undertaking by the lessor of the plaintiff not to enforce it before the expiration of a certain period. *Doe v. Hilkard*, 5 C. & P. 132. Where the plaintiff is nonsuited in consequence of the non-appearance of the defendant to confess, &c., an affidavit, stating the circumstances of the case, has sometimes been required by the judge before granting the certificate. *Doe v. Dawson*, *ubi supra*. But it has often been granted, under the same circumstances, without any affidavit.

Immediate execution — Certificate under stat. 1 W. 4. c. 7. s. 2.] By this statute it is enacted, that "in all actions to be brought in either of the said courts (namely, the courts of law at Westminster), by whatever form of process the same may be commenced, it shall be lawful for the judge, before whom any issue joined in such actions shall be to be tried, in case the plaintiff or demandant therein shall become nonsuit, or a verdict shall be given for the plaintiff or demandant, defendant or tenant, to certify under his hand, on the back of the record, at any time before the end of the sittings or assizes, that in his opinion execution ought to issue in such action forthwith, or at some day to

be named in such certificate, and subject, or not, to any condition or qualification; and in case of a verdict for the plaintiff, then either for the whole or for any part of the sum found by such verdict; in all which cases a rule for judgment may be given, costs taxed, and judgment signed forthwith, and execution may be issued forthwith, or afterwards, according to the terms of such certificate, on any day in vacation or term; and the *postea* with such certificate, as a part thereof, shall and may be entered of record, as of the day on which the judgment shall be signed, although the writ of *distringas juratores*, or *habeas corpora juratorum*, may not be returnable until after such day. Provided always, that it shall be lawful for the party entitled to such judgment to postpone the signing thereof."

Affidavits have been admitted in support of an application for immediate execution. *Ruddick v. Simmons*, 1 *M. & Rob.* 184. But in another case Lord Lyndhurst rejected them; *Gervas v. Burtchley*, 1 *M. & Rob.* 150.

The certificate has been refused in some instances in an action of debt on simple contract. *Fisher v. Davies*, 1 *M. & Rob.* 93. But it was afterwards granted in that action by Parke J., on consulting Boland B. *Younge v. Crooks*, 1 *M. & Rob.* 220. It has been granted after a verdict by consent, *Percival v. Alcock*, 1 *M. & Rob.* 167.; and in trespass for mesne profits. *Barden v. Cox*, 1 *M. & Rob.* 203. And where plaintiff had a verdict on one count, while a demurrer was pending on another, immediate execution was granted on his undertaking to enter a *nolle pros.* on the count demurred to. *Allsopp v. Smith*, 7 *C. & P.* 708.

It is not usually granted on trials at the sittings in term.

Certificate for costs.] By 3 & 4 Vict. c. 24., the statute 43 Eliz. c. 6. so far as respects costs in actions of trespass or case, and 22 & 23 Car. 2. c. 9. as to costs in personal actions, are repealed, and the following enactments substituted:

Sect. 2. "If the plaintiff in any action of trespass, or of trespass on the case, brought or to be brought in any of Her Majesty's courts at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Common Pleas at Durham, shall recover by the verdict of a jury less damages than forty shillings, such plaintiff shall not be entitled to recover or obtain from the defendant in respect of such verdict any costs whatever, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of enquiry, that the action was really brought to try a right besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance in respect of which the action was brought was wilful and malicious."

Sect. 3. "Provided always, and be it enacted, that nothing herein contained shall extend to or be construed to extend to deprive any plaintiffs of costs in any action or actions brought for a trespass or trespasses over any lands, commons, wastes, closes, woods, plantations, or enclosures, or for entering into any dwellings, outbuildings, or premises in respect of which any notice not to trespass thereon or therein

shall have been previously served by or on behalf of the owner or occupier of the land trespassed over, upon, or left at the last reputed or known place of abode of, the defendant or defendants in such action or actions."

Under this act it has been considered that, where it appears from the declaration that the action could not have been brought to try any right besides damages, the judge has no power to certify. *Shuttleworth v. Cocker*, 1 M. & G. 829. But in such a case the statute will nevertheless operate to deprive the plaintiff of costs, if the damages are under 40s. *Marriott v. Stanley*, *ib.* 853. If the action was brought to try the right, it matters not that the defendant by his plea has not chosen to contest it; *per* Maule B. in *Shuttleworth v. Cocker*, *supra*. A certificate may be granted in an action for imitating the wrappers of a medicine invented by the plaintiff. *Morison v. Salmon*, 9 Dowl. P. C. 387. So wilfulness and malice may be certified in a case of libel; the word "malice" importing personal malice, and not mere malice in law. *Foster v. Pointer*, 8 M. & W. 395. A plaintiff, who recovers nominal damages in a second action for infringing his patent, must have a certificate under this act; otherwise he cannot recover the treble costs given to him by 5 & 6 W. 4. c. 83. s. 3. *Gillett v. Green*, 7 M. & W. 347. The judge may take a reasonable time to consider the application for a certificate. He is not bound to give it instantly at the close of the trial, nor before the adjournment of the court; *Thompson v. Gibson*, 8 M. & W. 281.; *Page v. Pearce*, *ib.* 678.; nor, *seem.* *per* Lord Abinger C. B., *ib.*, on the same day; the object of the legislature being only to exclude the operation of any intervening fact or discussion upon the judge's mind, and to make the certificate "the result of his impression at the time."

The court above has no jurisdiction to review the discretion exercised by the judge at Nisi Prius. *Barker v. Hollier*, 8 M. & W. 513.

Certificate for costs of one of the issues.] By 4 Ann. c. 16. s. 5., which gave leave to plead several matters, it is provided that if any such matter shall be judged insufficient on demurrer, costs shall be given at discretion; or "if a verdict shall be found on any issue in the said cause for the plaintiff or demandant, costs shall be also given in like manner, unless the judge who tried the said issue shall certify that the said defendant or tenant, or plaintiff in replevin, had a probable cause to plead such matter, which upon the said issue shall be found against him."

Buller J., in *Duberley v. Page*, 2 T. R. 394., remarks that he never knew a judge at Nisi Prius certify in favour of the party pleading double, when the issues were found against him; "for it is but just that the party who created that expense should pay it." Such a certificate was, however, granted in *Robinson v. Messenger*, 8 A. & E. 607.; and the court held that the power of the judge at Nisi Prius was not affected by the late rules H. T. 4 W. 4. (7.); and the certificate need not, it seems, be granted immediately after the trial. *Fry v. Monckton*, 9 Dowl. P. C. 967.

Certificate for costs where one of several defendants has a verdict.] By 3 & 4 W. 4. c. 42. s. 32., where several are defendants in a personal action, and any one or more shall have a verdict pass for him or them,

such person shall have judgment for his reasonable costs, unless "the judge before whom the cause shall be tried shall certify, upon the record under his hand, that there was a reasonable cause for making such person a defendant in such action."

Where a statute, passed before the above, provided for the protection of officers acting in the execution of it that a defendant acquitted should have full costs, &c., it was held that a certificate under the above act would not deprive him of such costs. *Humphrey v. Wodehouse*, 1 New Ca. 506.

Certificate of distinct matters under different counts or pleas.] By R. G. H. T. & W. 4. (see *post*, Appendix No. I.), where a judge has permitted several counts, avowries, or pleas to stand, and stated that he is satisfied that distinct matters of complaint or defence are intended to be established at the trial, the judge who tries the cause may certify his opinion that no such distinct matter, &c. was *bonâ fide* intended to be established in respect of each count, &c. This certificate must be given before final judgment, and deprives the successful party of all costs on such counts, &c.

If counts 1 and 2. have been allowed under the above rule, and the plaintiff succeeds on count 2., and the judge certifies that no distinct matter of complaint was intended to be proved under count 1., such certificate will not deprive him of the costs of count 2. : it should have certified as to *both*. *Dewar v. Swabey*, 11 A. & E. 913.

Certificate for costs of special jury.] Where this certificate is necessary, it must be applied for "immediately after the verdict" or nonsuit. In *Waggett v. Shaw*, 3 Camp. 316., an application on the day after the trial was considered too late. But see the decisions on 3 & 4 Vict. c. 24. *ante*, p. 187.

EVIDENCE IN PARTICULAR ACTIONS.

ASSUMPSIT ON SALE OF REAL PROPERTY.

Vendor against Vendee.

IN an action of assumpsit by the vendor of real property on the purchaser's default in completing the contract, the plaintiff may be called upon by plea to prove the contract; the performance, by himself, of all conditions precedent; and the defendant's default.

Proof of the contract.] It will be necessary to prove a contract in writing; for by the Statute of Frauds, 29 Car. 2. c. 3. s. 4., no action shall be brought, whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

The note, or writing, must specify the terms; for otherwise all the danger of perjury, which the statute intended to guard against, would be let in. *Sugd. V. & P.* 76. Thus, where an auctioneer's receipt for the deposit was set up as an agreement, it was rejected because it did not state the price to be paid for the estate; *Blagden v. Bradbear*, 12 Ves. 466. But had the receipt referred to the conditions of sale, so as to have entitled the court to look at them for the terms, it might have been enforced as an agreement. *Ibid.* So, if a letter, properly signed, does not contain the whole agreement, yet if it actually refers to a writing that does, it will be sufficient, though the latter writing is not signed; and parol evidence is admissible to show the identity of the writing referred to. *Clinan v. Cooke*, 1 Sch. & Lef. 22. *Allen v. Bennet*, 3 Taunt. 169. *Smith v. Surman*, 9 B. & C. 561. And where a contract in writing exists which binds one party to the contract under the statute, any subsequent note, signed by the other, is sufficient to bind him, provided it either contains the terms, or refers to any other writing that contains them. *Dobell v. Hutchinson*, 3 A. & E. 355. The agreement cannot be enforced unless both the contracting parties are named in it. *Charlewood v. Duke of Bedford*, 1 Atk. 497. *Wheeler v. Collier*, M. & M. 123.

With regard to the signing it has been held, that a printed name is sufficient, *Saunderson v. Jackson*, 2 B. & P. 238. (decided on the 17th sect.), if recognised by, or brought home to the party, as having been printed by his authority; *Schneider v. Norris*, 2 M. & S. 288. (on the 17th sect.); and it is immaterial in what part of the agreement the name is

signed. *Ibid.* *Johnson v. Dodgson*, 2 M. & W. 653. *Knight v. Crockford*, 1 Esp. 190. But whether the writing of his name by the defendant, in the body of the instrument, for a particular purpose, (as stating a rent to be paid to himself,) be a sufficient signing, appears to be doubtful. *Stokes v. Moore*, 1 Cox, 219. *Cox's note* to 1 P. Wms. 771. A signing as witness has been held sufficient, if the party signing is cognisant of the contents of the instrument. *Welford v. Beazely*, 3 Atk. 503. *Harding v. Crethorn*, 1 Esp. 58. But this doctrine was doubted by the Court of Queen's Bench in *Gosbell v. Archer*, 2 A. & E. 500. In that case the auctioneer's clerk signed the contract, "Witness T. N.," without more; this was held not to be a signing by an agent of the vendor, though the deposit was paid over to the vendor's attorney, who wrote a letter to the vendee's attorney advising the purchase to be relinquished; for such facts did not amount to a ratification of the agency of T. N. or of the contract, even supposing the signature, as witness, to be sufficient.

The statute requires the agreement to be signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised. It is good as against him though only signed by the party to be charged, and not by the other party; *Seton v. Slade*, 7 Ves. 275.; and see the cases collected *Sugd. V. & P.* 73.; see also *Saunders v. Jackson*, 2 B. & P. 238. (on the 17th sect.); *Laythorp v. Bryant*, 2 New Ca. 735. With regard to the person authorised by the party to sign, it is settled that such person need not be authorised in writing. *Coles v. Trecothick*, 9 Ves. 250. *Emmerson v. Heelis*, 2 Taunt. 48. A sale by auction is within the Statute of Frauds, and the auctioneer is the agent for both the vendor and vendee. *Kenworthy v. Schofield*, 2 B. & C. 947. The agent must be a third person, and not one of the parties; *Wright v. Dannah*, 2 Camp. 203.; therefore, if the action is brought against the purchaser by the auctioneer himself, the signing of the defendant's name by the auctioneer will not be sufficient to satisfy the statute. *Farebrother v. Simmons*, 5 B. & A. 333. (on the 17th sect.). But the signature by the auctioneer's clerk was held to be sufficient in an action by the auctioneer, where the clerk, as each lot was knocked down, named the purchaser aloud, and, on a sign of assent from him, made a note accordingly in a book. *Bird v. Boulter*, 4 B. & Ad. 443. A subsequent recognition of the authority of the agent by the principal is sufficient. *Maclean v. Dunn*, 4 Bing. 722. *Gosbell v. Archer*, 2 A. & E. 500.

The plaintiff is put to the proof of a sufficient writing within the Statute of Frauds by the plea of *non-assumpsit*. *Buttemere v. Hayes*, 5 M. & W. 456. *Eastwood v. Kenyon*, 11 A. & E. 438.

Performance of conditions precedent.] The declaration in an action against a vendee for not completing the purchase is always a special one, in which the averments of performance must be traversed, if disputed. The issues therefore sufficiently point out the proofs necessary at *Nisi Prius*.

If the title of the plaintiff is put in issue, he must prove his title to the property sold; but if he produces his deeds at the trial in proof of his title, it has been held unnecessary for him to cull the subscribing witnesses; *Thompson v. Miles*, 1 Esp. 185.; *Sugd. V. & P.* 216.; 2 *Phill. Ev.* 99.; but in *Crosby v. Percy*, 1 Camp. 304., the plaintiff was held to strict proof of his derivative title. And where the plaintiff

sold a lease, and, by the conditions of sale he was "not to produce any title prior to the lease," it was held that he was bound to prove the lease by calling the attesting witness. Bosanquet J. there said that it was not necessary to decide the point discussed in *Thompson v. Miles* and *Crosby v. Percy*; and Park J. declared those cases to be unsatisfactory. Tindal C. J. put the case on the ground that the plaintiff, having declared that he was *possessed of a lease*, was bound to prove that allegation in the ordinary manner. *Laythoarp v. Bryant*, 1 New Ca. 421. The point seldom arises in practice, both because, when leasehold property is sold, the conditions of sale often contain an express provision dispensing with strict proof; and because, where abstracts of title are delivered, the refusal to complete the purchase is generally preceded by some communication between the parties, in which a specific objection has been pointed out, and the title admitted to be in other respects unexceptionable. See the observations of Tindal C. J. in *Laythoarp v. Bryant*, *supra*.

If the purchaser has not made an application for the title before the commencement of the action, and no time is fixed for completing the contract, it will be sufficient if the plaintiff can show a good title in himself at the time of trial. *Thompson v. Miles*, 1 Esp. 185. But this depends on the terms of the contract; and where it can be shewn to have been in fact broken, at any time before action brought, by want of a title to convey, the defendant cannot afterwards cure the defect by obtaining a good title. *Roper v. Coombes*, 6 B. & C. 534. *Dobell v. Hutchinson*, 3 A. & E. 356.

Indebitatus count.] This count cannot be sustained unless the conveyance is complete, and nothing remains to be done but to pay the money. *Hallen v. Randon*, 1 C. M. & R. 271.; *per* Parke B. It is therefore of little use in practice, as the execution of the deed and payment of money are usually concurrent acts.

Defence.

It is a good ground of defence, that an erroneous misstatement, or misdescription, has been wilfully introduced into the conditions of sale, to make the land appear more valuable. *Duke of Norfolk v. Worthy*, 1 Camp. 340.; and see *Vernon v. Keys*, 12 East, 637. The result of the decisions on this question is thus stated by Tindal C. J. "All the cases concur in this, that when the misstatement is wilful or designed, it amounts to fraud, and such fraud, upon general principles of law, avoids the contract altogether. But with respect to misstatements which stand clear of fraud, it is impossible to reconcile all the cases; some of them laying it down that no misstatements which originate in carelessness, however gross, shall avoid the contract, but shall form the subject of compensation only; whilst other cases lay down the rule that a misdescription in a material point, although occasioned by negligence only, not by fraud, will vitiate the contract of sale. (*Jones v. Edney*, 3 Camp. 285. *Waring v. Haggart*, R. & M. 40. *Stewart v. Alliston*, 1 Merivale, 27.) In this state of discrepancy between the decided cases, we think it is at all events a safe rule to adopt, that when the misdescription, although not proceeding from fraud, is in a material and substantial point so far affecting the

subject-matter of the contract that it may reasonably be supposed that but for such misdescription the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of sale, as in *Jones v. Edney*, 3 Camp. 285., where the subject-matter was described to be a free public-house, and the lease contained a proviso that the lessee and his assignees should take all their beer from a particular brewery, in which case the misdescription was held to be fatal." *Flight v. Booth*, 1 New Ca. 370. Where premises were *malâ fide* described as "a substantial brick building," which were not such; and a plot of land, mentioned in the particulars, did not exist at all; the sale was held voidable. *Robinson v. Musgrove*, 2 M. & Rob. 92. So, where they were described as an "eligible investment;" and they were, in fact, liable to be taken under a local public act; held, that the purchaser might rescind the contract; and that the act, though public, was not notice *per se*. *Ballard v. Way*, 1 M. & W. 520. And where the premises, including a yard, were said to be held under a term of twenty-three years, when, in truth, the yard, which was an essential part, was held under a yearly tenancy; the purchaser was allowed to rescind the sale, though a lease of the yard for the same term was afterwards procured by the seller, and though there was a clause in the conditions for compensation in the case of erroneous description, and a provision that the contract should not be annulled by it. *Dobell v. Hutchinson*, 3 A. & E. 355. But where it was provided by the conditions of sale, that "if any mistake should be made in the description of the premises, or if any other material error should appear in the particulars of sale, such mistake or error should not annul the sale, but a compensation should be made," the vendee was held not to be released from the contract by reason of a misdescription in the particulars of sale obvious on inspection of the premises, unless such misdescription was wilful and designed. *Wright v. Wilson*, 1 M. & Rob. 207. So a specific performance for the purchase of a meadow was decreed, where a visible footway went across it, of which no notice was given. *Oldfield v. Round*, 5 Ves. 508.; but see *Sugd. V. & P.* 283., 8th ed. But where building ground was sold as such, without notice of a right of way reserved across it by a lease of another portion of it, held that the contract was voidable; and the purchaser was permitted to avoid it as to two lots separately bought at an auction, though the defect applied only to one lot; the seller having afterwards united both in a single contract of sale at an entire sum, *Dykes v. Blake*, 4 New Ca. 463.

The defendant may insist upon a defect in the plaintiff's title; and a court of law will enter into equitable objections to it. *Maberley v. Robins*, 5 Taunt. 625. *Elliot v. Edwards*, 3 B. & P. 181.; but see *Alpass v. Watkins*, 8 T. R. 516. *Romilly v. James*, 1 Marsh. 600. The purchaser may reject a questionable title; and therefore a purchaser of a lease, described as containing none but usual covenants, is not bound to accept it, if it contains an unusual covenant, though such covenant is *probably* bad in point of law; for he may call for a clear title, and is not bound "to buy a lawsuit." *Hartley v. Pehall, Peake*, 131.; see also *Waring v. Hoggart*, R. & M. 39. Where a lease was sold by auction, and produced and read at that time, and, amongst the

premises demised, was a summer-house, which had been pulled down before the sale, and which the lease required to be rebuilt, it was held that the purchaser was not bound to complete the contract, though no mention was made of the summer-house in the particulars of sale. *Granger v. Worms*, 4 Camp. 83.

Where the property consisted of several parcels sold by auction in distinct lots, Lord Kenyon held that the vendor, having made out a title to a single lot, only, the whole contract might be rescinded; considering the purchase of the several lots as having been made with a view to a joint concern, and that the contract, for the convenience and interest of the purchaser, must be understood to be one entire contract for the whole. *Chambers v. Griffiths*, 1 Esp. 150. But see the cases cited in *Sugd. V. & P.* 268., where it is said that *Chambers v. Griffiths* cannot be maintained as an authority, except where it can be shewn that there was an understanding that the purchaser was not to take any of the lots unless he should obtain them all; and this is said to have been the opinion of Lord Eldon. And in a late case it was held that, where several lots are knocked down to a bidder at an auction, and his name marked against them in the catalogue, a distinct contract arises on each lot. *Roots v. Lord Dormer*, 4 B. & Ad. 77. In *Dykes v. Blake*, 4 New Ca. 463., the vendee was allowed to repudiate two lots, bought separately, because they were made the subject of one entire contract by a written agreement signed at the auction.

The purchaser may refuse to take a conveyance executed under a power of attorney; as it multiplies his proofs. *Coore v. Callaway*, 1 Esp. 116. *Richards v. Barton*, id. 268.

Where a purchaser makes a proposal to purchase and gives the vendor a certain time to consider it, he, the purchaser, may within that time retract the offer. *Routledge v. Grant*, 4 Bing. 653. *Head v. Diggon*, 3 M. & R. 97.

Where more than one person are employed to bid by the vendor at the sale, not for the purpose of preventing a sale at an undervalue, but to take advantage of the eagerness of bidders to screw up the price, it seems that this will be deemed a fraud. *Sugd. V. & P.* 24. *Crowder v. Austin*, 3 Bing. 368. *Wheeler v. Collier*, M. & M. 126.

Vendee against Vendor.

If the vendor refuses, or is unable, to complete his contract, the purchaser may either declare specially on such contract, or, in case he has made a deposit or paid part of the purchase-money, may recover it in an action for money had and received. In the former action he will be entitled to recover the deposit, interest, and any expenses to which he may have been put in investigating the title, by way of special damage; in the latter he will be entitled to recover the purchase-money or deposit only. *Camfield v. Gilbert*, 4 Esp. 221. *Walker v. Constable*, 1 B. & P. 306.

In a special action on the contract by the purchaser, he must prove the contract, on a plea of non assumpsit; and by other pleas he may be put to prove the performance of conditions precedent, and all other matters traversed by the defendant. When the defendant's title is objected to, it will not be enough to prove that the title has been deemed by conveyancers to be insufficient; the defect must be pointed out.

Camfield v. Gilbert, 4 *Esp.* 221. When an abstract is delivered by the vendor, he must be able to verify it by the title deeds in his possession; and unless a good title is made out at the day fixed, the purchaser will be entitled to rescind the contract. *Cornish v. Rowley*, *Selw. N. P.* 170. *Berry v. Young*, 2 *Esp.* 640. (n.) It was ruled by Lord Tenterden that the vendor of a lease is not bound to shew his lessor's title without an express stipulation to that effect. *George v. Pritchard*, *R. & M.* 417. But this decision has been since overruled, and it has been held by the Court of King's Bench, that, unless there be a stipulation to the contrary, there is, in every contract for the sale of a lease, an implied undertaking to make out the lessor's title to demise, as well as the title of the vendor to the lease. *Souter v. Drake*, 5 *B. & Ad.* 992. And where, on a sale by auction of leasehold property, one of the conditions of sale was, "that the vendor should not be obliged to produce the lessor's title," it was held that the vendee, having *akunde* discovered certain defects in the lessor's title, was entitled to insist on those defects. *Shepherd v. Keatley*, 1 *C. M. & R.* 117.; 4 *Tyr.* 571. *S. C.* When the title, as stated in the abstract, is objected to, the vendor may compel delivery of a particular of every matter of fact relied upon as an objection; but not of matter of law; *Roberts v. Rowlands*, 3 *M. & W.* 543. If a particular has not been given, the plaintiff will be at liberty to prove any infraction of the conditions of sale. *Squire v. Tod*, 1 *Camp.* 293.; see *Todd v. Hoggart*, *M. & M.* 128. *post*, p. 195.

When the plaintiff seeks to recover the deposit, he must prove payment of it to the defendant. A payment to the agent of the vendor is, in law, a payment to the principal, and, in an action against the latter for the recovery of the money, it is immaterial whether it has actually been paid over to him or not. *Duke of Norfolk v. Worthy*, 1 *Camp.* 337. But where the deposit has been paid to the auctioneer, an action for it will lie against him before payment over to his principal; *Burrough v. Skinner*, 5 *Burr.* 2639.; and see *Edwards v. Hodding*, 5 *Taunt.* 815.; and where an auctioneer signed a contract for the sale of a house in his own name, and received the deposit (his principal being present), and then, in the absence of the purchaser, paid over the deposit to his principal, it was ruled by Lord Tenterden that the purchaser might, notwithstanding the payment over, maintain an action against the auctioneer for the deposit. *Gray v. Gutteridge*, 3 *C. & P.* 40. But it seems that interest on the deposit cannot, except under particular circumstances, be recovered, unless a demand for the repayment of the money has been made. *Lee v. Munn*, 8 *Taunt.* 45. *Farquhar v. Farley*, 7 *Taunt.* 594. See now statute 3 & 4 *W. 4. c.* 42. s. 28. Where an auctioneer does not disclose the name of his principal, an action will lie against himself for damages on breach of contract. *Hanson v. Roberdeau, Peake*, 120. *Simon v. Motivos*, 3 *Burr.* 1921. After the purchaser has recovered the deposit only from the auctioneer, he may, in a special action against the vendor, recover interest and the expenses of investigating the title. *Farquhar v. Farley*, 7 *Taunt.* 592.

To enable the purchaser to maintain an action for money had and received to recover the deposit, the contract must be disaffirmed *ab initio*. Some of the grounds upon which it may be rescinded are stated *suprà*. If the purchaser has taken possession of the premises

under the contract, he has adopted the contract, and cannot disaffirm it afterwards by quitting the premises ; as the parties cannot be put in the same situation in which they before stood. *Hunt v. Silk*, 5 East, 449. If the original contract be void, or if it be a parol agreement for the sale of lands, the purchaser can only recover his deposit in this form of action, for he cannot sue upon the special contract. *Walker v. Constable*, 1 B. & P. 306. Where the vendor was unable to complete his contract on the day, and it also appeared that the purchaser was not prepared to pay the purchase-money on that day, Best C. J. held that the agreement was entirely vacated, and the purchaser entitled to recover his deposit. *Clarke v. King*, R. & M. 394. As a general rule, the vendee is bound to tender a conveyance to the vendor for execution by him ; *Poole v. Hill*, 6 M. & W. 835. ; yet, even when he is bound by the express terms of the contract to tender one, if a bad title be produced, he may maintain an action for the recovery of his deposit without tendering it. *Loundes v. Bray*, Sugd. V. & P. 223. So where the vendor has, by selling the estate, incapacitated himself from executing a conveyance to the purchaser, further trouble and expense on his part are unnecessary, and he may accordingly sustain an action without tendering a conveyance, or the purchase-money. *Knight v. Crockford*, 1 Esp. 190., Sugd. V. & P. 223. And if the vendor, when called upon for an abstract of his title, though before the time when the conveyance was to be made, appears to have no title, the vendee may rescind the contract. *Roper v. Coombes*, 6 B. & C. 534. The plaintiff cannot, at the trial, insist upon any objection to the title as stated in the abstract, which he neglected to take at the time of rescinding the contract, and which might have been remedied by the vendor if taken before. *Per Lord Tenterden C. J.*, *Todd v. Hoggart*, M. & M. 128.

Damages.] With regard to the damages, it seems that the purchaser, in a special action, may recover from the vendor the deposit with interest, and the expenses of investigating the title, searching for judgments, &c. *Hodges v. Litchfield*, 1 New Ca. 492. *Turner v. Beaurain*, Sugd. V. & P. 214. *Farquhar v. Farley*, 7 Taunt. 592. But see *Wilde v. Fort*, 4 Taunt. 341. If the purchase-money has been lying ready, without any interest being made of it, and it was reasonable to keep it so lying, it seems that interest may be recovered. *Sherry v. Oke*, 3 Dowl. P. C. 349. But a person, who has agreed to advance a sum on mortgage, cannot recover interest on it, where the negotiation fails for want of title, unless there be a special contract to pay it. *Sweetland v. Smith*, 1 C. & M. 585. The purchaser cannot recover expenses incurred previously to entering into the contract ; nor the expenses of a survey of the estate made before he knows the title ; nor the expense of a conveyance drawn in anticipation ; nor the extra costs of a suit for specific performance brought by the vendor ; nor losses on the resale of stock prepared for the farm. *Hodges v. Litchfield*, 1 New Ca. 492. The purchaser is not entitled to recover compensation for the fancied goodness of his bargain, where the vendor is, without fraud, incapable of making a title. *Flureau v. Thornhill*, 2 W. Bl. 1078. *Bratt v. Ellis*, Sugd. V. & P. 40. *Walker v. Moore*, 10 B. & C. 416. In *Flureau v. Thornhill*, the vendor offered to convey such title as he had, or to return the purchase-money with interest : but

where a person, who had contracted for the purchase of an estate, but had not obtained a conveyance, put it up for sale in lots by auction, and engaged to make a good title by a certain day, which he was unable to do because his vendor never made a conveyance to him, it was held that the purchaser of certain lots might, in an action for not making a good title, recover not only the expenses which he had incurred, but also damages for the loss he had sustained by not having the contract carried into effect. *Hopkins v. Grazebrook*, 6 B. & C. 31. In this case the vendor was in fault, by wilfully representing himself to be the owner of the property, when, in fact, he was not so; by which it has been distinguished from the case of *Walker v. Moore*, 10 B. & C. 416. The expenses of investigating the title cannot be recovered under a count for money paid; *Camfield v. Gilbert*, 4 Esp. 221.; nor can interest be recovered on the money counts; *Fruhling v. Schroeder*, 2 New Ca. 77.; except by force of 3 & 4 W. 4. c. 42. s. 28., as to which, see post, "*Assumpsit for interest.*"

ASSUMPSIT FOR USE AND OCCUPATION.

This action is grounded on stat. 11 G. 2. c. 19. s. 14., by which it is enacted, that it shall be lawful for landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, or hereditaments held or occupied by the defendants in an action *on the case* for the use and occupation of what was so held or enjoyed; and if, on the trial of such action, any parol demise, or any agreement (not being by deed) whereon a certain rent was reserved, shall appear, the plaintiff shall not therefore be nonsuited, but may make use thereof as evidence of the quantum of damages to be recovered.

The action of *debt* for use and occupation lies at common law and not upon this statute. *Egler v. Marsden*, 5 Taunt. 25.

On the plea of non assumpsit the plaintiff must prove all the material parts of his declaration; that is, an occupation of premises of the plaintiff by the defendant with the permission of the plaintiff, and the amount of rent either expressly reserved, or due on the footing of a *quantum meruit*.

Plaintiff's title.] If the defendant has come in under the plaintiff, or has acknowledged his title by the payment of rent to him or otherwise, he will not be permitted to impeach it at the trial; *Sylvian v. Stradling*, 2 Wils. 208., *Cooke v. Loxley*, 5 T. R. 4., *Phipps v. Scutthorpe*, 1 B. & A. 50.; and it is not material in such case that the plaintiff should have the legal estate. *Hull v. Vaughan*, 6 Price, 157. But unless the defendant came in under the plaintiff, or has recognised his title, the plaintiff can only recover rent from the time that the legal estate vested in him. *Cobb v. Carpenter*, 2 Camp. 13. (n.) Where a party, after letting defendant into possession on an agreement for a future lease, mortgaged the premises to the plaintiff, who gave notice to the defendant of the mortgage, it was held that the plaintiff might recover, in this form of action, rent accruing due for a period subsequent to the mortgage, and unpaid before the notice. *Rawson v. Kicke*,

7 A. & E. 451. A defendant, whose tenancy began under A., and who has afterwards paid rent to the *cestui que trust* under A.'s will, cannot set up the want of the legal estate to an action for use and occupation by *cestui que trust*, though the fact is disclosed by the plaintiff's evidence. *Dolby v. Hes*, 11 A. & E. 335. There is a distinction between the case where a person has actually received possession from one who has no title, and the case where he has merely attorned by mistake to one who has no title; in the former case the tenant cannot, except under very special circumstances, dispute the title; in the latter he may. *Per Bayley J.*, in *Cornish v. Searell*, 8 B. & C. 475. *Rogers v. Pitcher*, 6 Taunt. 202. *Gravenor v. Woodhouse*, 1 Bing. 38.; and see the cases cited *post*, under "*Replevin*." "*Evidence on plea of non demisit or non tenuit*." Thus, where a tenant took premises from "A. and B., for and on behalf of the trustees of the joint estate of C. and D.;" and it appeared at the trial, on the evidence of the plaintiffs (who described themselves in the declaration as joint trustees), that they were trustees of C. only; it was held that the tenant was estopped from taking advantage of this variance. *Fleming v. Gooding*, 10 Bing. 549. So where A. hired apartments by the year from B.; and B. afterwards let the entire house to C., who sued A. for use and occupation, it was held that A. could not impeach C.'s title. *Rennie v. Robinson*, 1 Bing. 147. But where land, belonging to a parish, was occupied by A.; and he paid rent to the churchwardens, who executed a lease of the same land for a term of years to B., and gave A. notice of the lease; in an action for use and occupation by B. against A. it was held that A. was not precluded from disputing B.'s title, for that B. could not (before 59 G. 3. c. 12. s. 17.) derive a valid title from the churchwardens. *Phillips v. Pearce*, 5 B. & C. 433.

In general the title of the plaintiff is established by the production of a lease or agreement, which is proved in the usual manner by calling the attesting witness &c.; but if there be no actual lease or agreement, the plaintiff's title may be established by evidence of the defendant having paid rent to him, or submitted to a distress by him. *Panton v. Jones*, 3 Camp. 372. Notice to produce the receipts for rent, or the notice of distress, should in such cases be given by the plaintiff. Where the defendant occupied the plaintiff's land under the powers of a local act, and, upon a dispute respecting the right of the plaintiff to demand rent, a decree for payment was made in an amicable suit in chancery, in which the defendant acquiesced for several years, it was held that he could not afterwards dispute his liability to rent in an action for use and occupation. *Allason v. Stark*, 9 A. & E. 255. If it appears from the plaintiff's witnesses that the defendant holds under a written agreement not produced; or which, when produced, cannot be read for want of a stamp; the plaintiff will not be allowed to give parol evidence of the holding. *Brewer v. Palmer*, 3 Esp. 213. *Ramabottom v. Mortley*, 2 M. & S. 445. *R. v. Padstow*, 4 B. & Ad. 208.; and see *ante*, p. 3. Declaration in assumpsit, that defendant had held land under a lease from E. on certain terms set out on the record; that the reversion came to plaintiff; that defendant, in consideration of an alteration of the rent, promised to hold of plaintiff on the same terms in all other respects; plea, non assumpsit. Held, that the plaintiff, not having proved an express contract to hold of defendant on the old terms, could not rely upon an implied contract arising from the old lease, without putting

it in evidence ; and that it could not be used for such purpose without being properly stamped. *Walliss v. Broadbent*, 4 A. & E. 877.

Defendant's occupation.] It is *prima facie* sufficient for the plaintiff to prove that the defendant did occupy the premises ; and the continuance of the occupation will be presumed till the contrary appears ; *Harland v. Bromley*, 1 Stark. 455. *Ward v. Mason*, 9 Price, 291. A constructive occupation of the premises by the defendant is sufficient ; an occupation which he might have had, if he had not voluntarily abstained from it. *Per Gibbs C. J.*, *Whitehead v. Clifford*, 5 Taunt. 519. *Pincro v. Judson*, 6 Bing. 206. But there must be an occupation actual or constructive ; therefore a tenant, who had agreed to take furnished lodgings, but had not entered, was held not to be liable to an action for use and occupation. *Edge v. Strafford*, 1 C. & J. 391. And in *Woolley v. Walling*, 7 C. & P. 610., where a tenant, by written agreement, had agreed to take premises from a future day, it was held not to be enough to put in the agreement, but that evidence must be also given of some occupation under it. And the assignee of the reversion cannot, as it seems, maintain this action for rent incurred before the assignment ; for there was then no occupation of the plaintiff's property by the defendant. *Mortimer v. Preedy*, 3 M. & W. 602. If A. agree to let lands to B., who permits C. to occupy them, B. may be sued for use and occupation. *Bull v. Sibbs*, 8 T. R. 327. *Conolly v. Barter*, 2 Stark. 527. Receiving the rents and profits from an under-tenant is proof of use and occupation by the person receiving them ; *Neal v. Sibind*, 2 C. & J. 377. ; and a lessee, whose under-lessee holds over against the lessee's will, is liable to this action. *Ibbs v. Richardson*, 9 A. & E. 849. So a tenant, who has quitted in pursuance of a parol surrender to his landlord, without having given or received a notice to quit, remains liable ; *Mollett v. Brayne*, 2 Camp. 104. ; and see *Mathews v. Sawell*, 8 Taunt. 270. *Thomson v. Wilson*, 2 Stark. 379. *Johnstone v. Hudleston*, 4 B. & C. 922. ; even though the landlord, on the tenant's quitting, puts up a bill in the window for the purpose of getting another tenant for the premises ; *Redpath v. Roberts*, 3 Esp. 225. *Johnstone v. Hudleston*, 4 B. & C. 922. ; unless the landlord has actually accepted a third person as tenant ; for this operates as a surrender in law of the first tenant's term. *Thomas v. Cook*, 2 B. & A. 119. In order to make out a surrender, it must appear that the landlord has given up his old tenant and accepted a new one with the consent of all parties. *Graham v. Whichelo*, 1 C. & M. 188. A., the tenant of a house, three cottages, and a stable and yard at an entire rent for a term of seven years, before the expiration of the term assigned all the premises to B. for the remainder of the term, the houses and cottages being in the possession of under-tenants. The landlord accepted a sum of money as rent up to the day of the assignment, which was in the middle of a quarter. B. took possession of the stable and yard only. The occupiers of the cottages having left them after the assignment and before the expiration of the term, the landlord re-let them. A. paid no rent after the assignment, but the landlord received rent from the under-tenants. Before the expiration of the term the landlord advertised the whole of the premises to be let or sold. It was held, that this was a surrender by operation of law of all the premises. *Reeve v. Bird*, 1 C. M. & R. 31. ; *S. C.* 4 Tyr. 612. Where a tenant from year to

year, at a rent payable half-yearly, quitted without giving a notice to quit; and the landlord, before the expiration of the next half-year, let the premises to another tenant; it was held that the landlord was not entitled to recover rent from the first tenant from the expiration of the current year when he quitted the premises to the time when the landlord re-let the same to the second tenant; *Hall v. Burgess*, 5 B. & C. 332; and see *Walls v. Alcherson*, 3 Bing. 462.; and in such case, if the tenant quit by consent in the middle of a quarter, the landlord cannot recover rent *pro ratâ* for the portion of the quarter during which the tenant occupied. *Grimman v. Legge*, 8 B. & C. 324. *Whitehead v. Cliford*, 5 Taunt. 518. Where the tenant pays up to a certain quarter, and a third person afterwards comes into possession and pays rent at irregular periods, a jury may presume that the landlord has accepted the latter as his tenant. *Woodcock v. Nuth*, 8 Bing. 170. Although the premises are burnt down, and remain unoccupied, the tenant still continues liable in this action for the rent subsequently accruing; for the premises continue to be "held" by the defendant; *Baker v. Holtzaffell*, 4 Taunt. 45. *Ison v. Gorton*, 5 New Ca. 501.; unless it be agreed that the liability shall cease after the fire; in which case the lessee will be liable, in use and occupation, for a proportion of the rent during the time of actual occupation. *Packer v. Gibbins*, 1 Q. B. 421.

Before the late bankrupt act it was held that assumpsit for use and occupation lay against a lessee upon his agreement to pay rent during the tenancy, notwithstanding his bankruptcy and the occupation of the assignees during part of the time for which the rent accrued. *Boot v. Wilson*, 8 East, 311. But now, by 6 G. 4. c. 16. s. 75., a bankrupt, entitled to any lease or agreement for a lease, if the assignees accept the same, shall not be liable to pay any rent accruing after the date of the commission; and, if the assignees decline the same, shall not be liable as aforesaid in case he delivers up such lease or agreement to the lessor, or person agreeing to grant it, within fourteen days after he shall have had notice that the assignees have declined. The insolvent acts contain a similar provision to the above.

Under this act, where rent accrued after the date of the commission, and the bankrupt offered to deliver up possession of premises, held by parol demise, to his lessor the day before the rent became due, it was held that he could be sued *pro ratâ* for use and occupation. *Slack v. Sharpe*, 8 A. & E. 366. Where the assignees entered and occupied premises in the middle of a year, it was adjudged that use and occupation could not be maintained against them for the bankrupt's occupation as well as their own, unless the bankrupt's occupation was at their request; *Naish v. Tallock*, 2 H. Bl. 319.; but see *Gibson v. Courthorpe*, 1 D. & R. 205.

Use and occupation does not lie against a husband for a half year's rent due in respect of premises occupied for part of that time by his wife before marriage, and which continued to be occupied by her for a short time after her marriage. *Richardson v. Hall*, 1 B. & B. 50. Where one of two executors of a deceased tenant for years enters into the premises, such entry does not enure as the entry of both so as to make them both liable in an action for use and occupation. *Nation v. Tozer*, 1 C. M. & R. 172.; *S. C.* 4 Tyr. 561.

If, after the determination of a lease, the tenant holds over and pays rent, such payment is conclusive evidence of a tenancy; and he will be

that eight months after the intestate's death he had offered to surrender them to the plaintiff, this was held a good defence. *Remnant v. Brenridge*, 8 Taunt. 191. This case has, however, been doubted; see *Hornidge v. Wilson*, 11 A. & E. 645. 652. It is also a good defence that the defendant has had no beneficial occupation through the default of the plaintiff; as where the premises have become unsafe and useless for want of repairs, the tenant not being bound to repair; in which case he is not liable in this action after he has quitted, though without notice to quit. *Edwards v. Etherington*, R. & M. 268. And though the tenant is bound to do tenantable repairs, yet if the premises become unwholesome for want of sufficient drainage, which cannot be remedied without great expense, he may quit without regular notice. *Collins v. Barrow*, 1 M. & Rob. 112.

Defendant treated by plaintiff as a trespasser.] If the landlord has treated the tenant as a trespasser, he cannot afterwards recover against him in this action. Thus if he has recovered against him in ejectment, he cannot sue, in this action, for the rent accruing after the day of the demise; for, by not waiving the tort, he has precluded himself from suing *ex contractu*. *Birch v. Wright*, 1 T. R. 378. *Bridges v. Smyth*, 5 Bing. 410. But the mere bringing of an ejectment, and laying the demise before the time of the rent accruing, is no bar to an action for use and occupation. *Cobb v. Carpenter*, 2 Camp. 13. (n.)

Statute of limitations.] The statute of limitations is a good defence in an action against a person who has been tenant from year to year, but who has not, within the last six years, occupied the premises, paid rent, or done any act from which a tenancy can be inferred; though no notice to quit has been given. *Leigh v. Thornton*, 1 B. & A. 625.

Illegality.] It is a good defence that the premises have been knowingly let by the plaintiff to the defendant for an immoral purpose. *Crisp v. Churchill* cited 1 B. & P. 340. *Jennings v. Throgmorton*, R. & M. 251. But *quære*, whether this defence must not be pleaded specially?

Distress.] It seems to be no defence that the landlord has distrained goods to the full value of the rent, if he has sold them for a less sum. If he has sold them at too low a rate, the tenant's remedy is by action; *Efford v. Burgess*, 1 M. & Rob. 23.; and it is no defence that the tenant quitted, without giving notice, in the fear of a distress by the superior landlord. *Rickett v. Tullick*, 6 C. & P. 66.

ASSUMPSIT ON BILLS OF EXCHANGE.

Production and proof of the bill.] In actions upon bills of exchange and promissory notes, it is generally necessary for the plaintiff to produce the bill or note on which he has declared, wherever the form of pleading puts it in issue; but where it appears that the instrument has been destroyed; as where the defendant tore his own note of hand; a copy is admissible. *Anon.* 1 Ld. Raym. 731. The plaintiff cannot recover on a lost bill indorsed by the payee, without proving that it has

been destroyed ; though he has offered an indemnity to the defendant ; *Picson v. Hutchinson*, 2 Camp. 211. *Hansard v. Robinson*, 7 B. & C. 90. ; and though the bill was lost after it became due ; *Poole v. Smith, Holt*, 144., *Hansard v. Robinson*, *ubi supra* ; and an express promise by the defendant to pay the lost bill will not entitle the plaintiff to recover. *Davis v. Dodd*, 4 Taunt. 602. But where a bill is lost with only a special indorsement upon it by the payee, the indorsee may recover upon it ; for the holder can make no title to it ; *Long v. Baike*, 2 Camp. 214. (n.) ; and see *Smith v. Clarke, Peake*, 225. So the payee of a note, not negotiable, may require payment without producing it. *Wain v. Bailey*, 10 A. & E. 616. If the acceptor improperly detains the bill in his hands, the drawer or other party may sue him upon it, and give him notice to produce it ; *Smith v. McClure*, 5 East, 477. ; and where the defendant had admitted that he owed the money due upon a bill, which was in his own possession, Abbott C. J. held that such admission might be given in evidence under the common counts without a notice to produce the bill. *Fryer v. Brown, R. & M.* 145.

The bill or note produced must appear to be the same upon which the plaintiff has declared ; and, if any material variance exist, it will be fatal, unless amended by leave of the judge at Nisi Prius. Where a bill appears to be altered, it lies upon the party producing it to shew that the alteration was not improperly made. *Henman v. Dickinson*, 5 Bing. 183. See further as to alterations on a bill, *anté*, p. 164, 165., and *post*, " Defence."

Variance in names.] A variance in the name of a party to the bill, as described in the declaration, is fatal ; but where the plaintiff is misnamed, he may shew by evidence that he was the person intended. *Wilks v. Barrett*, 2 Stark. 29. Where a bill is drawn with the payee's name in blank, and in the declaration it is stated that A. B. (a *bonâ fide* holder who has inserted his own name) was payee, it is no variance. *Attwood v. Griffin, R. & M.* 425. In an action against several joint makers of a note, it is no objection, on the ground of variance, that one of them, who has let judgment go by default, has been sued by a wrong Christian name ; the identity of the party, and service of the writ on him, being shewn. *Dickinson v. Bowes*, 16 East, 110. But in an action against three makers of a note, two of whom had been outlawed in the action, the third may take advantage of a variance in the names of the others. *Gordon v. Austin*, 4 T. R. 611. So where the misnomer is in the name of a person not a party to the action, and cannot therefore be pleaded in abatement, it is fatal. *Whitwell v. Bennett*, 3 B. & P. 559. But the name of a party to the bill may be stated as on the bill, though it be not the real name. *Forman v. Jacob*, 1 Stark. 47. Proof that other persons joined the defendant in drawing or accepting the bill, is immaterial ; it being matter of plea in abatement for non-joinder, and not a variance. *Mountstephen v. Brooke*, 1 B. & A. 224.

As to variance in the date of the bill or note, *vide anté*, p. 66.

Variance in the place of payment.] If a bill is drawn (in the body of it), payable at a particular place, it is a variance to state it without that qualification. *Bayley on Bills*, 310. So where a bill is directed to " A. B. payable in London " at the foot of it, payment in London is part of the contract, and the qualification should be stated. *Hodge v. Ellis*,

3 *Camp.* 463. But see *post*, 206. And where a note contains, in the body of it, a promise to pay at a particular place, it is a variance to omit the place. *Roche v. Campbell*, 3 *Camp.* 247. *Sanderson v. Bowes*, 14 *East*, 500. But when the place of payment is only mentioned in the memorandum at the foot of a note, it is no variance to omit it; *Price v. Mitchell*, 4 *Camp.* 200. *Williams v. Waring*, 10 *B. & C.* 2.; and if stated in the declaration to be made payable there "according to the tenor and effect," it is a variance. *Eson v. Russell*, 4 *M. & S.* 505. But where a note was alleged to be payable at a certain place, and it was only made so payable by a memorandum at the bottom, Abbott C. J. held it no variance. *Hardy v. Woodroffe*, 2 *Stark.* 319. *Sproule v. Legg*, 3 *Stark.* 157. Where the memorandum at the foot of the note was printed, Lord Ellenborough considered the place of payment there mentioned to be part of the contract. *Trecothick v. Edwin*, 1 *Stark.* 468. As to variance in acceptances, see *post*, 206.

Variance in direction.] An allegation that the bill was "directed" to the defendant, is not supported by proof that the drawer drew the bill to his own order, payable at a specified place; though the defendant has accepted it. *Gray v. Milner*, 2 *Stark.* 336. But where a bill, made payable to the drawer's order "at No. 1. Wilmot Street" but directed to no one, was in fact accepted by the defendant residing at No. 1., it was held that defendant might be sued on it as on a bill whereby he was "requested to pay," &c. *Gray v. Milner*, 8 *Taunt.* 739. *Quære*, whether this latter decision does not, in effect, overrule the former? In an action against the acceptor upon a bill directed to him, or, in his absence, to J. S., the conditional direction to J. S. need not be stated. *Anon.* 12 *Mod.* 447.

Variance in consideration.] The words "value received," in a bill payable to the drawer's order, mean value received by the drawee; and if stated to be value received by the drawer, it is a variance. *Highmore v. Primrose*, 5 *M. & S.* 65. *Priddy v. Henbrey*, 1 *B. & C.* 675. But where the bill is drawn payable to the order of a third person, "for value received," it is no variance to state that it was for value received "of the drawer." *Grant v. Da Costa*, 3 *M. & S.* 351. "Value received," in a note, imports value received from the payee. *Clayton v. Gosting*, 5 *B. & C.* 360. Value received in leather, instead of value delivered in leather, is no variance. *Jones v. Mars*, 2 *Camp.* 306.

Variance in statement of the sum.] Where the declaration on a bill, drawn in Ireland, stated that it was drawn for a certain sum without stating it to be Irish currency, which it was in fact, the variance was held fatal. *Kearney v. King*, 2 *B. & A.* 301. *Sproule v. Legge*, 1 *B. & C.* 16. A bill, expressed in words to be for the sum of 200*l.*, had 245*l.* written on it in marginal figures, and a stamp for the larger amount; held that this was a bill for the less amount, and that parol evidence of error was inadmissible. *Saunderson v. Piper*, 5 *New Ca.* 425.

Variance in proof of the drawing, accepting, or indorsing.] Where the declaration stated that A. indorsed a note, "his own handwriting being thereunto subscribed," and it appeared to have been indorsed by procuration, it was held a variance; *Levy v. Wilson*, 5 *Esp.* 180.; but

in a similar case, where it appeared that the name was written by the wife of the indorser by his authority, Lord Ellenborough was inclined to think it enough to shew the name was written by an authorised agent; *Helmusley v. Loader*, 2 Camp. 450. And where the declaration stated that the defendants made their bill "their own proper hands being thereunto subscribed," and the bill appeared to be drawn in the name of the defendant's firm of "Mars and Co." in the hand of one of the defendants, Lord Ellenborough refused to nonsuit for the variance. *Jones v. Mars*, 2 Camp. 305. So where the averment was as in the last case, but it appeared that the name was written by the son of the party with his authority, Lord Tenterden held it to be no variance; as the whole allegation might be rejected. *Booth v. Grove, M. & M.* 182. Where it was stated that a bill was drawn which was afterwards accepted by the defendant, and it appeared that the acceptance was written before the drawing, the variance was held immaterial. *Molloy v. Deloës*, 7 Bing. 428. A note, made by A. only, cannot be declared on as the joint note of A. and B., though given to secure a debt for which A. and B. were jointly liable. *Siffin v. Walker*, 2 Camp. 308. If the word "at" be inserted before the name of the drawee, it is no variance to state that the bill was drawn on the drawee. *Shuttleworth v. Stephens*, 1 Camp. 407.; and see *R. v. Hunter, R. & R. C. C. R.* 511. *Allan v. Mawson*, 4 Camp. 115. Where an instrument was in this form, "Three months after date I promise to pay, &c.

"J. B. Grutherot,"

"John Bury."

It was held, that the holder might treat this as a promissory note, or a bill of exchange, at his election. *Edis v. Bury*, 6 B. & C. 433.

A memorandum indorsed on a note after it is signed, stating the note to have been given upon a condition mentioned in an agreement referred to in the memorandum, is a mere ear-marking of the note, and does not incorporate the agreement into it. *Brill v. Crick*, 1 M. & W. 232.

Variance in presentment.] Where the averment is that the bill was presented "when it became due and payable, to wit, on" &c., it is not necessary to prove the exact day laid under the *videlicet*; and therefore if the alleged day be a Sunday, it is immaterial; *Bynner v. Russell*, 1 Bing. 23.; and an alleged presentment "when the bill became payable," &c., means, as against the acceptor, after it became payable. *Forman v. Jacob*, 1 Stark. 46. If a presentment by a certain person is alleged, a presentment by another may be proved. *Boehm v. Campbell*, 1 Gow. 55.

Payee against Acceptor.

The proofs in this action will entirely depend upon the pleadings; if the acceptance is intended to be put in issue, it must be traversed by the plea.

Acceptance in writing or parol.] By stat. 1 & 2 G. 4. c. 78., no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless the acceptance be in writing on the bill, or, if there be more than one part of the bill, on one of the parts. The word "accepted," written on the bill, is sufficient without the acceptor's sig-

nature, unless the jury are of opinion that the acceptance was left incomplete. *Dufaur v. Oxenden*, 1 M. & Rob. 90. An acceptance in blank, the bill being afterwards drawn in pursuance of the acceptor's authority, is good. *Leslie v. Hastings*, 1 M. & Rob. 119. But, in the case of foreign bills, a parol acceptance, or an acceptance by a collateral writing, is still sufficient by the law of England. The following cases may therefore be taken as applicable to such bills. A letter stating that such a bill "shall meet with due honour," is an acceptance; *Clarke v. Cock*, 4 East, 57.; or that the holder "may rest satisfied as to payment." *Wilkinson v. Lutwidge*, 1 Stra. 649. *Wynne v. Reikes*, 5 East, 514. "What! not accepted? We have had the money, and the bills ought to be paid; but I do not interfere in this business; you should see my partner," was held to be an acceptance. *Fairlee v. Herring*, 3 Bing. 625. The drawer of certain foreign bills, being arrested, said, "that he would have accepted them when presented, but he had not the funds from France, and that when he got the funds he would have paid them, but for some expressions of the indorsee," adding, that "he told the clerk of the indorsee that when he got the funds from France the bills should be paid." This was held to be a good conditional acceptance; and, it appearing that he had got the funds from France, he was held liable. *Mendizabel v. Machado*, 6 C. & P. 218.; S. C. 3 Moore & S. 831. "Your bill shall have attention," is not an acceptance; *Rees v. Warwick*, 2 B. & A. 113.; and a promise to pay a non-existing bill is no acceptance. *Johnson v. Collings*, 1 East, 98. A person is not liable as acceptor who accepts by procuration for the drawee, but without his authority; for no one can be liable as such but the person to whom the bill is addressed, unless he be an acceptor for honour. *Polhill v. Walter*, 3 B. & Ad. 122.

Acceptance, absolute or conditional.] If the acceptance was in fact conditional, it will not support the allegation of an absolute one, though the condition has been performed. *Langton v. Corney*, 4 Camp. 177. *Ralli v. Sarell*, D. & R. N. P. C. 33. *Swan v. Cox*, 1 Marsh. 176. If the condition has not been performed, a legal excuse must be averred and proved if denied.

Acceptance, general or special.] An acceptance, expressed to be payable at a banker's or other place, was held to be a special or qualified, and not a general, acceptance. *Rowe v. Young*, 2 B. & B. 165. But now, by 1 & 2 G. 4. c. 78., such acceptance is a general one unless it be expressed to be payable at a banker's, or other place, *only, and not otherwise or elsewhere*. A bill which is drawn payable at a particular place, and accepted payable there, is within this statute, and, unless the acceptance is a special one within the act, it is not necessary, as against the acceptor, to aver or prove a presentment at the particular place; it being held that there is no distinction between the case where the bill is so rendered payable by the language of the drawer, and where it is accepted so payable by the language of the acceptor. *Selby v. Eden*, 3 Bing. 611. *Fayle v. Bird*, 6 B. & C. 531. But it is otherwise in an action against the drawer. *Gibb v. Mather*, 8 Bing. 214. The use of the word "only" is not essential to qualify the acceptance, if the words "and not elsewhere" are inserted. *Higgins v. Nichols*, 7 Dowd. P. C. 551. In the case of a general acceptance it is not necessary to

aver or prove a presentment ; and if the holder neglects to present, and the bankers, at whose house it is made payable generally, fail with money of the acceptor in their hands, the acceptor is not thereby discharged ; *Turner v. Hayden*, 4 B. & C. 1. ; but if the acceptance is qualified, the plaintiff must aver and prove presentment at the place named. *Rouge v. Young*, 2 B. & B. 165.

Acceptance, how proved.] The general issue not being pleadable since the new rules, the acceptance, unless specially traversed, is admitted. Where traversed, the acceptance, if written, is proved by evidence of the acceptor's handwriting, or, if there is an attesting witness, by calling him. If several, not partners, are acceptors, the handwriting of all must be proved. *Gray v. Palmers*, 1 Esp. 135. If one of several partners accepts a bill drawn on the firm, it is sufficient to prove the partnership, and his handwriting, in an action against all ; *Mason v. Rumsey*, 1 Camp. 384. ; but it is a good defence that the plaintiff had notice that the firm would not be bound by such an acceptance ; *Galloway v. Mathew*, 10 East, 264. ; or that the bill was not accepted for partnership purposes, and that there was covin between the partner who accepts and the plaintiff. *Shirreff v. Wilks*, 1 East, 48. But in the absence of fraud or collusion, a party who has received a bill, given by one of several partners in the name of the firm for his separate debt, may sue the partnership on such bill. *Swan v. Steele*, 7 East, 210. *Ridley v. Taylor*, 13 East, 175. *Lloyd v. Ashby*, 2 B. & Ad. 23. But where the partner has subscribed in the name of a firm slightly differing from the real name, it is a question for the jury whether he had authority from the firm to do so ; or whether he must be taken to have issued the bill on his own account ; *Faith v. Richmond*, 11 A. & E. 339. ; and it seems that no partner has any implied authority to bind in any but the true style of the firm. *Kirk v. Blurton*, 9 M. & W. 284. After the bankruptcy of one of two partners, the solvent partner may bind the firm by accepting a bill in the hands of a *bona fide* indorsee for a debt previously due from the firm. *Ex parte Robinson*, 1 Mont. & Ayr. 18. There is no implied authority in a director of a joint stock company, not being a trading partnership, to accept bills of exchange on the part of the directors of the company. *Bramah v. Roberts*, 3 New Ca. 972. *Dickinson v. Valpy*, 10 B. & C. 128. Nor can such authority be implied from the fact that the defendants have paid similar bills accepted before some of them became directors. *S. C.* 3 New Ca. 972. In an action against A. and B. as acceptors, if A. pleads a plea which admits his signature, yet it must be proved as against B. ; *Gray v. Palmers*, 1 Esp. 135. ; and where the acceptance is stated to be by A., B., and C., which is denied by A. and B. ; but C. suffers judgment by default ; A. and B. are entitled to a verdict, if they prove that the bill was drawn on the directors of a company and accepted by them as such, but only signed by C. as a manager, and not as director ; *Bull v. Morrell*, 12 A. & E. 745. If the acceptance is by an agent, his authority and handwriting must be proved ; and the agent himself is competent to prove the authority. If the authority be in writing it should be produced and proved. *Johnson v. Mason*, 1 Esp. 90. It is not enough to prove that the defendant's name was subscribed with the sanction of, but not by, his wife, who conducted his business, had signed promissory notes in his name, and had applied the proceeds of the bill in

payment of his debts. *Goldstone v. Tovey*, 6 New Ca. 98. If the defendant acknowledges his handwriting, or promises to pay; *Jones v. Morgan*, 2 Camp. 474.; or pays part; *Vaughan v. Fuller*, 2 Stra. 1246.; it is an admission, and dispenses with proof of the acceptance. An admission by one of several acceptors, not partners, is not evidence against the rest; *Gray v. Palmers*, 1 Esp. 135.; but after a partnership is established, the admission of the partner who accepted the bill will be proof of the acceptance against all; *Hodenspyl v. Vingerhoed*, *Chitty on Bills*, 489. 5th ed., see *ante*, p. 43.; and an admission by one partner of his partnership with his co-defendant, who had been outlawed, was held to be sufficient proof of the partnership as against him. *Sangster v. Mazarredo*, 1 Stark. 161. If the acceptor, on being applied to for payment, desires the party to call again, it will not preclude him from proving the acceptance to be a forgery; but it is otherwise if he has adopted the acceptance; as by paying other bills accepted by the same party; *Barber v. Gingell*, 3 Esp. 60.; or by acknowledging the handwriting to be his; *Leach v. Buchanan*, 4 Esp. 226. See *Griffits v. Payne*, 11 A. & E. 131.; *post*, "Defence." Where, in an action against the acceptor of a bill, his attorney gave a notice to produce all papers relating to the bill in question, described as "accepted by the said defendant," the notice was held to be *prima facie* evidence of the acceptance. *Holt v. Squire*, R. & M. 282.

Some evidence of the identity of the defendant and the person who accepted the bill is necessary; and it is not sufficient merely to prove that a person, calling himself by the same name, accepted the bill. *Jones v. Jones*, 9 M. & W. 75. *Whitelocke v. Musgrove*, 1 C. & M. 511. Where the acceptor was described as "C. B. Crawford, East India House," proof that the signature was that of a person of the same name, a clerk of the East India House, was held to be evidence of identity. *Greenshields v. Crawford*, 9 M. & W. 314. Whether there be any evidence of identity is for the judge; *Corfield v. Parsons*, 1 C. & M. 730.; but the sufficiency of the proof seems to be for the jury; *per Lord Abinger C. B. in Greenshields v. Crawford*, *supra*.

Acceptance, effect of, in accrediting the drawing.] An acceptance admits the handwriting of the drawer; and, if the bill be drawn by procuration, the procuration; *Robinson v. Yarrow*, 7 Taunt. 455. *Porthouse v. Parker*, 1 Camp. 82.; and the acceptor cannot say that the drawer's name is forged; *Smith v. Chester*, 1 T. R. 655.; or that the drawer is ill described in the bill; *Bass v. Clive*, 4 M. & S. 15.; nor can he set up the drawer's inability, as that he was an infant. *Taylor v. Croker*, 4 Esp. 187.

Evidence under the common counts.] If the payee is also the drawer, the bill will be evidence under the count for money had and received; *Thompson v. Morgan*, 3 Camp. 101.; or under the count on an account stated; *Rhodes v. Gent*, 5 B. & A. 245.; but not where the payee or holder are third persons; unless there be an express promise by the defendant to pay the plaintiff; *Early v. Bowman*, 1 B. & Ad. 889.; and see cases cited in note to *Wells v. Girling*, Gow. 22. An acknowledgment of the debt by the defendant will enable the holder to recover upon the count on an account stated. *Higmore v. Primrose* 5 M. & S. 65. Where there is a count on a bill and a money count, and a

payment into court upon the latter, and no evidence offered by the plaintiff upon such count except the bill, the defendant will be entitled to a general verdict, if the money paid in covers the amount due on the bill. *Early v. Bowman*, *supra*; and see *antè*, p. 47.

Indorsee against Acceptor.

In this action the plaintiff may be put to prove the indorsements alleged, besides the facts required to be proved in an action by the payee.

Indorsement, how proved.] The acceptance only admits facts that were necessarily apparent on the face of the bill when accepted; therefore none of the indorsements are admitted by the acceptance; *Smith v. Chester*, 1 T. R. 654.; and even where the bill is payable to the drawer's order, his handwriting as indorser must be proved, though his name was on the bill at the time of acceptance. *Bosanquet v. Anderson*, 6 Esp. 43. So where a bill, payable to the drawer's own order, was drawn and indorsed by procuration by the same person, it was held that the acceptance only admitted the drawing by procuration, and not the indorsement by procuration. *Robinson v. Yarrow*, 7 Taunt. 455. And even where the indorsements were made before acceptance, the defendant does not thereby admit the indorsement. *Smith v. Chester*, 1 T. R. 654. *Robinson v. Yarrow*, *supra*. But in an action against the acceptor of a bill, drawn in favour of A. and B., and indorsed by A. in the name of A. and B., and afterwards accepted by the defendant, on its being objected that the payees were not partners, and that, therefore, the indorsement was irregular, Lord Ellenborough is said to have held, that after acceptance, the defendant could not dispute the regularity of the indorsement. *Jones v. Radford*, 1 Camp. 83. But see *Bosanquet v. Anderson*, 6 Esp. 43. Where a bill is drawn in the name of a fictitious person payable to the order of the drawer, the acceptor is considered as undertaking to pay to the order of the person who signed as the drawer; and therefore an indorsee may bring evidence to shew that the signatures of the supposed drawer, to the bill and to the first indorsement, are in the same handwriting. *Cooper v. Meyer*, 10 B. & C. 468. Where there was no proof of the handwriting of one of the indorsers, but it appeared that the indorsement was upon the bill when the defendant accepted it, and that he promised to pay it, Ryder C. J. left the case to the jury, who found for the plaintiff, and the court refused a new trial. *Hankey v. Wilson*, Say. 223. So an offer made by the acceptor to pay a bill, with certain names on it, is a sufficient admission of the plaintiff's title, so as to supersede the necessity of proof of each person's handwriting. *Bosanquet v. Anderson*, *supra*. Where the bill was shewn to the drawer with the name of the payee indorsed upon it, and the drawer merely objected to the want of consideration, it was ruled that it did not supersede the necessity of proving the indorser's handwriting. *Duncan v. Scott*, 1 Camp. 101. See also *Sidford v. Chambers*, 1 Stark. 326. An admission of his handwriting by the indorser, though evidence against himself, is not evidence of indorsement in an action against the acceptor; *Hemings v. Robinson*, Barnes, 436.; but see *Maddocks v. Hankey*, 2 Esp. 647. *contrà*. An authority to draw does not of itself import an authority

to indorse bills, but is evidence to go to the jury. The clerk of the payees of a bill having been accustomed to draw checks and bills for them, and having been in one instance authorised to indorse a bill, and in two others having indorsed bills which had been discounted by the payees at their bankers, it was held that the jury were warranted in finding that the clerk had a general authority to indorse. *Prescott v. Flinn*, 9 Bing. 19. A farm bailiff, accustomed to pay and receive money for his employer, has no implied authority to draw or indorse bills in the name of his principal. *Davidson v. Stanley*, 2 M. & G. 721. Though a wife, who carries on business for her husband, may be presumed to have authority to indorse in his name, yet an indorsement by a feme covert, of a bill payable to her order, in her own name, conveys no interest; *Barlow v. Bishop*, 1 East, 432.; unless the jury can infer from circumstances an authority from her husband to her to indorse it in such name; as if he promises to pay the bill. *Id.* 434. *Cotes v. Davis*, 1 Camp. 485. *Prince v. Brunatle*, 1 New Ca. 435. Unless the persons indorsing are in partnership, the indorsement of each must be proved. *Carvick v. Vickery*, 2 Doug. 653. (n.) But if a partnership be proved, an indorsement by one of the partners, in the partnership name, is sufficient. S. C. On the dissolution of a partnership, a power, given to one of the partners to receive and pay debts, does not authorise him to indorse a bill in the name of the partnership. *Kilgour v. Finlayson*, 1 H. Bl. 155. *Lacy v. Woolcott*, 2 D. & R. 458. But a retiring partner may give his late partners authority by parol to indorse existing securities; and such authority may be inferred from circumstances. *Smith v. Winter*, 4 M. & W. 454.

A bill is presumed to be issued when dated; but the date of an indorsement, when material, must be proved either directly or by circumstances. *Anderson v. Weston*, 6 New Ca. 296.

The identity of indorser must be proved. In an action by an indorsee against the acceptor of a bill whereof E. S. was the payee, the plaintiff proved that a person, calling himself E. S., came to the plaintiff's residence, having in his possession the bill in question and also a letter of introduction proved to be genuine, which was expressed to be given to a person introduced to the writer as E. S., and also another bill of exchange drawn by the writer of that letter. The bearer of these documents, after remaining some days at the plaintiff's residence, indorsed to him the bill in question. This was held to be evidence of the identity of this person with E. S., in the absence of any evidence to the contrary. *Bulkeley v. Butler*, 2 B. & C. 434. Proof of indorsement by a person who professed to be, and called himself by the name of, the indorser and drawer, and whose handwriting resembled that on the bill, is evidence of identity as against the acceptor. *Smith v. Money Penny*, 2 M. & Rob. 317.

What indorsements need be proved.] If all the indorsements have been stated, though unnecessarily, they must (if denied) be proved; *Waynam v. Bend*, 1 Camp. 175. *Bosanquet v. Anderson*, 6 Esp. 43.; but when the first indorsement is in blank, the plaintiff may state an indorsement from the payee to himself immediately, though there be intermediate special indorsements, and it will then only be necessary to prove the first indorsement. *Smith v. Clarke*, Peake, 225. In an action by the indorsee of a bill against the acceptor, the first count stated all

the indorsements ; the second count an indorsement by the payee to the plaintiff ; Abbot, C. J. said that all the indorsements must be proved or struck out, though not stated in the declaration. " I remember," said his Lordship, " Mr. Justice Bayley so ruling, and striking them out himself at the trial ; and this need not be done before the trial." *Cocks v. Borrodaile*, *Chitty on Bills*, 392., 7th ed. Indorsements may be struck out even after the bill has been read in evidence, and objected to on the ground of omission to state them in the declaration. *Mayer v. Jadis*, 1 M. & Rob. 247. By striking out intermediate indorsements, the plaintiff loses the security of those indorsers.

Title of the plaintiff as indorsee.] When a bill is indorsed in blank, possession is sufficient *prima facie* title ; and several plaintiffs, suing as indorsees, need not prove that they are in partnership, or that the bill was indorsed to them jointly ; *Ord v. Portal*, 3 Camp. 239. *Rordasz v. Leach*, 1 Stark. 446. *Attwood v. Rattenbury*, 6 B. Moore, 579. ; but where it is specially indorsed to a firm, the partnership must be proved to consist of the plaintiffs ; *Ord v. Portal*, *supra* ; and where the plaintiffs sue in a particular capacity, as assignees of a bankrupt for instance, they must prove that the bills were indorsed to them in that capacity. *Bernasconi v. Duke of Argyle*, 3 C. & P. 29. When the indorsement is denied, defendant may shew that the right to sue on it as indorsees is in other persons, and not in the plaintiff ; though the indorsement is in blank ; *Mackell v. Kinnear*, 1 Stark. 499. ; and he may shew that, though indorsed in blank, it was never delivered to the plaintiff *as indorsee*, but only as agent for a particular purpose ; *Adams v. Jones*, 12 A. & E. 455. ; or had been obtained by fraud from the real holder. *Marston v. Allen*, 8 M. & W. 494.

Evidence under the money counts.] Although an acceptance is said to be evidence of money had and received by the acceptor to the use of the holder ; *Bayley on Bills*, 287. ; the later authorities, cited *anté*, p. 208., shew that it is available upon the common counts only where there is a privity, as where the parties on the record are immediate parties to the bill, or there has been a promise, account actually stated, or acknowledgment of liability, &c.

Drawer against Acceptor.

When a bill, not payable to the drawer's own order, has been dishonoured and taken up by the drawer, the latter may sue the acceptor, and in such action may be obliged by proper pleas to prove, 1. The acceptance, as to proof of which, see *anté*, p. 207. : 2. The presentment to the defendant and his refusal to pay ; which may be done by calling the person who presented the bill, or by proving a promise by the defendant to pay, which dispenses with proof of the presentment : and, 3. The return of the bill to, and payment thereof by, the plaintiff. To prove the latter fact, it is not sufficient to produce the bill with a receipt on the back of it from the then holder ; for the receipt *prima facie* imports that the bill was paid by the acceptor. *Scholey v. Walsby, Peake*, 24.

The bill may be given in evidence under the count for money had and received, where the drawer is also payee. *Thompson v. Morgan*, 3 Camp. 101.

Payee against Drawer.

In an action by the payee against the drawer, the plaintiff may have to prove, 1. The drawing of the bill : 2. Presentment to the drawee or acceptor : 3. His default : 4. Due notice to the defendant of the dishonour.

A defendant is not liable as drawer on a bill which he has drawn, not in his own name, but in the name of a firm of which he is not a member ; and *quære*, whether he would be liable upon the bill on proof that he had no authority from the firm, or had acted fraudulently in using their name ? *Wilson v. Barthrop*, 2 M. & W. 863.

The drawing of the bill.] The drawing of the bill, when traversed, must be proved by evidence of the drawer's handwriting ; or, if drawn by an agent, by proving the authority of the agent and his handwriting. A farm bailiff, intrusted to pay and receive money, has not any implied authority to bind his principal by drawing bills. *Davidson v. Stanley*, 2 M. & G. 721. If drawn in the name of a partnership, the partnership must be proved, and the handwriting of the partner who drew the bill. As to proof of partnership, see *ante*, p. 2., and *post*, "*Assumpsit for goods sold*," &c.

Presentment to the drawee or acceptor. — Checks.] A presentment for acceptance is not necessary except in case of bills payable within a limited time after sight ; *Bayley on Bills*, 182. ; but if presented and refused acceptance, due notice of such refusal must be given ; *Goodall v. Dolley*, 1 T. R. 712. ; though the drawer of a bill is not discharged by want of notice of non-acceptance, where the bill has passed into the hands of a *bonâ fide* indorsee, for value, who has no knowledge of the dishonour. *Dunn v. O'Keeffe*, 5 M. & S. 282. Where the bill is payable at a certain date, and not presented for acceptance, a presentment for payment on the last day of grace must be proved. *Tassell v. Lewis*, 1 Ld. Raym. 743. *Bayley on Bills*, 198. But where it is payable at a certain time after sight, or at sight, it need only be presented for acceptance within a reasonable time ; which has been held to be (though the authorities differ on the point) a question for the jury ; *Muilman v. D'Eguino*, 2 H. Bl. 565. *Fry v. Hill*, 7 Taunt. 397. ; or rather a mixed question of law and fact. *Shute v. Robins*, M. & M. 133. Per Tindal C. J. in *Mellish v. Rawdon*, 9 Bing. 423. If a bill, drawn at three days' sight, were put into circulation, and kept out in that way for a year, it would not, as it seems, be *laches* ; but if the holder were to lock it up for any length of time, it seems he would be guilty of *laches*. Per Buller J., *Muilman v. D'Eguino*, *supra*. The question in these cases is, whether, looking at the situation and interests of both holder and drawer, there has been any unreasonable delay on the part of the former in forwarding the bill for acceptance or putting it into circulation. *Mellish v. Rawdon*, 9 Bing. 416. Where a bill, drawn by the defendant at one month after sight on London, was delivered to the plaintiff on the 9th at Windsor, and was presented on the 13th, and the jury found a verdict for the plaintiff, the Court of C. P. refused to disturb the verdict. *Fry v. Hill*, 7 Taunt. 397.

A distinction has been taken with regard to bills, payable after sight,

drawn by bankers in the country on their correspondents in London. "It does not seem unreasonable," says Lord Tenterden, "to treat bills of this nature as not requiring immediate presentment, but as being retainable by the holders for the purpose of using them, within a moderate time (for indefinite delay of course cannot be allowed), as part of the circulating medium of the country." *Shute v. Robins, M. & M.* 133.

The payee of a check cannot recover the value against the drawer, if he has committed laches in presenting it to the banker for payment; and, by the general law, it ought to be sent for presentment at latest on the day following the receipt. *Rickford v. Ridge, 2 Camp.* 539. A check drawn, on Tuesday 28th March, on a banker at Bath, was cashed for defendant, the holder, by a branch of the N. W. Bank at Malmesbury on the same day. The same day it was forwarded to the principal N. W. Bank at Melksham, and might have been sent to Bath on that night. On Friday 31st it was presented at Bath and dishonoured. It was held, that the presentment was not in time to give the N. W. Bank any claim against the defendant. Tindal C. J., in delivering judgment, said, "The result of the cases is that the plaintiff, receiving a check, has till the following day to present it, when there are the ordinary means of doing so. Here the plaintiffs resided in a post-town, and, if they had transmitted the check to Bath by the next day's post, it would have been presented on Thursday. If there was any sufficient reason for not pursuing that course, it is on them to shew it; but I think upon this state of facts they have been guilty of laches." *Moule v. Brown, 4 New Ca.* 267.

Bills due on a Sunday or Christmas day (*Tassell v. Lewis, 1 Ld. Raym.* 743.), or on a Good Friday (39 & 40 G. 3. c. 42.), or on a fast day (7 & 8 G. 4. c. 15.), are to be presented on the day next before those respective days.

Presentment must be proved, although the acceptor has become bankrupt; *Russel v. Langstaffe, 2 Doug.* 514.; or insolvent; *Esdaile v. Sowerby, 11 East, 117.*; *Rohde v. Proctor, 4 B. & C.* 523.; and where he is dead, it must be made to his executor or administrator; or if there be none, at the house of the deceased. *Molloy, b. 2. c. 10. s. 34. Chitty on Bills, 317.* 5th ed. If the bill is payable at a particular place, it is not necessary to present it at any other. *Philpott v. Bryant, 3 C. & P.* 244. Where a bill is accepted by an agent, the drawee being abroad, presentment to the agent must be proved. *Philips v. Astling, 2 Taunt.* 206.

A bill, payable at a banker's, must be presented within banking hours; *Elford v. Teed, 1 M. & S.* 28.; but if presented after, and a servant stationed at the banking-house return for answers "no orders," it is sufficient. *Garnett v. Woodcock, 6 M. & S.* 44. *Henry v. Lee, 2 Chitty, 125.* See *Whitaker v. Bank of England, 1 C. M. & R.* 744. Presentment at eight in the evening, at the house of a merchant, is good. *Barclay v. Bailey, 2 Camp.* 527. So at half past seven, though no one be there. *Wilkins v. Jadis, 2 B. & Ad.* 186. Presentment to a banker's clerk, at the clearing-house, is a presentment at the banker's. *Reynolds v. Chettle, 2 Camp.* 596. *Harris v. Packer, 3 Tyr.* 370. (n.)

If a bill or note is made payable at a particular house, that house is the proper place at which to make the presentment, whether such house be mentioned in the body of the bill or note, or in the margin of it, or in the acceptance only. *Bayley on Bills, 174.,* citing *Ambrose v.*

Hopwood, 2 Taunt. 61. *Garnett v. Woodcock*, 1 Stark. 475. Although, since the statute 1 & 2 G. 4. c. 78., the holder of a bill accepted payable at a banker's (not saying, "and not otherwise," &c.) is not obliged, in order to charge the acceptor, to present it for payment there; *Turner v. Hayden*, 4 B. & C. 2.; yet a presentment there, and refusal, will, it seems, be sufficient to charge the drawer: *Semb. Macintosh v. Haydon*, R. & M. 363. Where the bill is drawn payable (in the body of it) in London, and is accepted payable at A. B. in London (without saying "not otherwise," &c.) in an action against the drawer presentment in London must be proved; statute 1 & 2 G. 4. c. 78. being confined to the case of actions against acceptors. *Gibb v. Mather*, 8 Bing. 214.; *S. C.* 2 C. & J. 254. Under the general averment that the bill was duly presented (without stating an acceptance), the plaintiff may prove a presentment at the place mentioned in the acceptance. *Parks v. Edge*, 1 C. & M. 429. If the presentment be at the place mentioned in the acceptance, the handwriting of the acceptor must be proved; otherwise it would not appear that the place indicated in the acceptance was appointed by him. *Sedgwick v. Jager*, 5 C. & P. 199. Where a bill was drawn on P. P. No. 6. Budge Row and accepted, in an action against the drawer an averment, that the bill was presented and shewn to P. P. for payment, was held to be supported by proof that the holder went to No. 6., but found the house shut up and no one there; for the words "and shewn" are surplusage; and notice of dishonour may be given on the same day. *Hine v. Allely*, 4 B. & Ad. 624. And where the bill is directed to the drawee by a certain address, and accepted generally, it is enough to present it to an inmate of the house at such address, though the drawee has in the mean time removed. *Burton v. Jones*, 1 M. & G. 83.

Presentment, proof of, when dispensed with.] When due presentment is traversed, evidence that excuses non-presentment cannot be admitted. *Per Parke B. in Burg v. Legge*, 5 M. & W. 421. Thus, if the acceptor cannot be found, so that no presentment can be made, this must be specially averred, and cannot be shewn on issue joined upon presentment. *Leeson v. Pigott*, *Bayley on Bills*, 324. But where the presentment is informal only, and the want of strictness is owing to the acceptor's default; as where the acceptor had changed his residence as described in the bill, and the plaintiff had presented it to an inmate at the late residence; there the averment of due presentment is supported. *Buxton v. Jones*, 1 M. & G. 83. So where the presentment is delayed by circumstances which constitute an excuse; as where the place of presentment is in the occupation of the king's enemies; for "duly presented," means presented according to the custom of merchants, which necessarily implies an exception in favour of those unavoidable accidents which must prevent the party from doing it within the regular time." *Per Lord Ellenborough C. J., in Patience v. Townley*, 2 Smith, 224. But a promise by the drawer to pay dispenses with the necessity of proving actual presentment; for such a promise is *prima facie* evidence that every thing has been done to entitle the plaintiff to demand the amount of the bill from the defendant. *Croxon v. Worthen*, 5 M. & W. 5.

Default of drawee or acceptor.] If the action is brought on a refusal to accept, it is sufficient for the plaintiff to shew that the drawee refused

to accept it generally, or according to the terms of the bill. *Boehm v. Garcias*, 1 *Camp.* 425. (n.) It is not sufficient to shew that the bill was presented to some person on the drawee's premises who refused to accept it, without connecting that person with the drawee; *Cheek v. Roper*, 5 *Esp.* 175.; unless the acceptor has left no one else on the premises where he is described as living. *Brown v. McDermot*, 5 *Esp.* 265. The refusal to accept, or pay, may be proved by the person who presented the bill for acceptance or payment.

Notice of dishonour, what sufficient.] There is no prescribed form of notice; but a mere demand of payment, without notice of the dishonour, is not sufficient. *Hartley v. Case*, 4 *B. & C.* 339. The notice must state, either expressly or in effect, that the bill has been dishonoured. Therefore the following notice from the attorney of the holder has been held insufficient: "A bill for 683*l.* drawn, &c., and bearing your indorsement, has been put into our hands by Mr. A. with directions to take legal measures for the recovery thereof unless immediately paid." *Solarie v. Palmer*, 7 *Bing.* 530. *S. C.* on error in *Dom. Proc.* 1 *New Ca.* 194. This decision has been considered to be against the weight of previous authorities and the general opinion of the profession; it is therefore not extended to any case not clearly within its principle. See the remarks of Tindal C. J. in *Messenger v. Southey*, 1 *M. & G.* 81. In the case of *Grugeon v. Smith*, 6 *A. & E.* 499. Patteson J., at Nisi Prius, held a notice in the following words sufficient: "Your bill due this day has been returned with charges, to which we request your immediate attention;" and the Court of King's Bench held the decision was right; and this case was approved of by the Court of Exchequer in *Hedger v. Seavenson*, 2 *M. & W.* 799., where a notice in the following words was held sufficient: "I am desired by Mr. Hedger to give you notice that a promissory note for 99*l.* 18*s.*, payable to your order two months after the date thereof, became due yesterday and has been returned unpaid, and I have to request you will please remit the amount thereof, with 1*s.* 6*d.* noting, free of post." But see *Boulton v. Welsh*, 3 *New Ca.* 688. "D.'s acceptance has been presented for payment, and returned, and now remains unpaid" is sufficient. *Cooke v. French*, 10 *A. & E.* 131. It is enough if the notice conveys to the mind of the receiver, by reasonable intendment, the following facts; 1. That the bill has been presented when due; 2. That it has been dishonoured; 3. That the party addressed is to be held liable on it. *Per Parke B.* in *Lewis v. Gomperts*, 6 *M. & W.* 399. "I have received an intimation from B. and M. Bank that your draft on A. B. has been dishonoured, and have requested them to proceed in the same;" held sufficient; for "dishonour" implies presentment. *Shelton v. Braithwaite*, 7 *M. & W.* 436. But where the notice shews no presentment, as where it states only *non-payment* of the bill, it is not enough. *Strange v. Price*, 10 *A. & E.* 125. So a notice in the following form was held bad: "This is to inform you that the bill I took of you is not taken up; and 4*s.* 6*d.* expenses; and the money I must pay immediately." *Messenger v. Southey*, 1 *M. & G.* 76.

A written notice is not required. *Crosse v. Smith*, 1 *M. & S.* 545. *Housego v. Cowne*, 2 *M. & W.* 349. If a witness proves that he verbally told the drawer of a bill of exchange, that his bill for 30*l.* drawn on T. had come back dishonoured, and that he had produced the bill

and pointed out to the drawer the notary's mark upon it, this is sufficient notice of dishonour. *Phillips v. Gould*, 8 C. & P. 355.

By whom given.] It is sufficient if the defendant has had notice of the dishonour of the bill from any person who is party to it; *Chapman v. Keane*, 3 A. & E. 193.; though it was formerly thought the notice must come from the holder. *Tindal v. Brown*, 1 T. R. 167. But notice given by a person not a party to the bill, without any authority, is not sufficient. *Stewart v. Kennett*, 2 Camp. 177. A notice by the plaintiff's attorney, not stating on whose behalf the notice is given, is sufficient. *Woodthorpe v. Lawes*, 2 M. & W. 109.

To whom notice should be given.] Where the holder of a bill is desirous of suing all the parties to it, he should give notice to all; for if he only gives notice to his immediate indorser, &c. it is possible that such notice may not be regularly transmitted to the prior parties, who may consequently be discharged. But if he gives notice to his immediate indorser, and he in due time to his indorser, and so on to the drawer, the holder may sue all or any of such parties, and it is no objection in such case that there was no notice immediately from the plaintiff to the defendant. *Bayley on Bills*, 209. *Rosc. Dig. Bills*, 198. The bankruptcy of the drawer does not dispense with proof of notice; and where notice was given to a bankrupt drawer before the appointment of assignees, it was held sufficient. *Ex parte Moline*, 19 Ves. 216. Where the drawer had become bankrupt and absconded, but his house remained open in the possession of the messenger, and no notice was given to the drawer, or left at his house, or given to the assignees, the drawer's estate was held to be discharged. *Rohde v. Proctor*, 4 B. & C. 517. Where the bankrupt had left his house, it was held that notice should be left there, and with the messenger in possession. *Ex parte Johnson*, 1 Mont. & Ayr. 622., 3 Deacon & Ch. 433. S. C. Where the drawer is dead, notice should be given to his executors or administrators. *Chitty on Bills*, 295. 5th ed. Where the drawers are in partnership, a notice to one is notice to all; and therefore, where a bill is drawn by a firm upon one of that firm, and dishonoured, notice of the dishonour need not be given to the firm. *Porthouse v. Parker*, 1 Camp. 82. The indorser of a dishonoured bill was abroad in Jamaica, but had a house in England; a notice was sent to his house, and the bill was shewn to his wife, who was informed of the non-payment; Lord Kenyon held it sufficient. *Cromwell v. Hynson*, 2 Esp. 511. *Housego v. Cowne*, 2 M. & W. 348. Where a substituted bill has been given and dishonoured, and the plaintiff sues on the first bill, he need not prove notice of the dishonour of the substituted bill. *Bishop v. Rowe*, 3 M. & S. 362.

Time within which notice must be given.] The general rule with regard to inland bills is, that, where the parties do not reside in the same town, it is sufficient to send a notice by the post on the day following that on which the party receives intelligence of the dishonour. *Williams v. Smith*, 2 B. & A. 496. Where there is a post on the day on which the party receives the notice, and no post on the following day, it is sufficient to forward the notice by the post of the third day. *Grill v. Jeremy*, M. & M. 61. If the parties reside in the same town, notice

must be given before the expiration of the day after that on which it has been received. *Smith v. Mullett*, 2 Camp. 208. Where the party receives notice on Sunday, Good-Friday, or Christmas-day, he is in the same situation as if it did not reach him till the next day. *Bray v. Hadwen*, 5 M. & S. 68. And where a bill is payable on the day preceding Christmas-day, Good-Friday, Thanksgiving-day, or Fast-day, it is not necessary for the holder to give notice until the day next after such Christmas-day, &c., 7 & 8 G. 4. c. 15. A Jew is not obliged to forward notice on the day of a great Jewish religious festival. *Lindo v. Unsworth*, 2 Camp. 602. If the holder place the bill in the hands of his banker, the latter is only bound to give notice to his customer in like manner as if he were himself the holder; and the customer has the same time to communicate the notice as if he had received it from the holder. *Haynes v. Birks*, 3 B. & P. 599. *Langdale v. Trimmer*, 15 East, 291. Where *laches* is once incurred, the drawer is discharged, though he receive notice at the time within which, had each person regularly transmitted notice to another, he would have received it. *Turner v. Leech*, 4 B. & A. 451. *Marsh v. Maxwell*, 2 Camp. 210. (n).

A notice on the day on which the bill becomes due is not too soon; for though payment may still be made within the day, non-payment on due presentment is a dishonour. *Burbridge v. Manners*, 3 Camp. 193. *Hine v. Allely*, 4 B. & Ad. 624. Where a bill is accepted payable abroad by a foreign acceptor, it is enough to give to the defendant such notice of dishonour and protest as the foreign law requires. *Rothschild v. Currie*, 1 Q. B. 43.

If the notice of dishonour sent to the drawer of a bill arrives too late through misdirection, it is for the jury to say whether the holder used due diligence to find the drawer's address; *Siggers v. Brown*, 1 M. & Rob. 520.; and if the delay arose from the bill having been sent to a wrong person, and such mistake arose from the indistinctness of the drawer's writing on the bill, he is not discharged. *Hewitt v. Thomson*, 1 M. & Rob. 543.

Delivery or giving of notice, proof of.] Strict proof of notice may be dispensed with by a distinct admission of liability; as by a promise to pay. *Hicks v. Duke of Beaufort*, 4 New Ca. 229. So a declaration by the defendant of his intention to pay the bill, "and not to avail himself of the informality of notice," is evidence of due notice; the expressions being too vague to shew that there really was any informality in it. *Brownell v. Bonney*, 1 Q. B. 39. So where defendant knew that the bill was unpaid, and only objected to pay it on the ground of fraud in the holder, *Ld. Tenterden C. J.* held it evidence of due notice. *Wilkins v. Jadis*, 1 M. & Rob. 41.

It is sufficient proof of the delivery of a notice in writing, to shew that it was sent in a letter by the post, without proving that the letter was received; *Saunderson v. Judge*, 2 H. Bl. 509., *Scott v. Lifford*, 9 East, 347.; and in case of the London post when the notice must be given on a certain day, the letter must be put into the post at such an hour that it may, in the usual course, be delivered on that day. *Stocken v. Collin*, 7 M. & W. 515. The post-mark is not conclusive of the time of posting. *Ibid.* If a notice is sent by post, the direction of the letter must not be too general, as "Mr. Haynes, Bristol"; *Waller v. Haynes*, R. & M. 149. But where the bill was dated "Manchester,"

it was held sufficient to direct to the drawer at "Manchester," generally. *Mann v. Moors*, R. & M. 249. So where a party drew a bill, dating it generally "London," on an acceptor resident in London whose address was stated on the bill, it was held that proof of a letter containing notice of dishonour of the bill having been put into the post office, addressed generally to the drawer "London," was evidence of due notice of dishonour. *Clarke v. Sharpe*, 3 M. & W. 166. If there is no post, the notice may be sent by any ordinary mode of conveyance; as, in case of a foreign bill, by the first regular ship bound for the place where notice is to be given. *Mulman v. D'Eguino*, 2 H. Bl. 565. In proving a notice sent by post, it was ruled by Lord Ellenborough not to be sufficient to shew that it was contained in a letter, which letter was put upon a table for the purpose of being carried to the post, and that, in the course of business, all letters deposited on that table were carried to the post; but perhaps it might have been sufficient had the person who was in the habit of carrying the letters to the post been called, and stated that he invariably carried all such letters to the post. *Hetherington v. Kemp*, 4 Camp. 193. Where, to prove the sending of a notice by post, the plaintiff's clerk was called, who stated that a letter containing the notice was sent by post on a Thursday morning, but he had no recollection whether it was put in by himself or another clerk, it was held that this was not sufficient evidence of putting into the post. *Hawkes v. Salter*, 4 Bing. 715. See *antè*, p. 10. Notice to the drawer by sending to his counting-house during business hours several times, and knocking and waiting there without effect, is sufficient without leaving a written notice, or sending one by post. *Crosse v. Smith*, 1 M. & S. 545.

Contents of notice, how proved.] Where a written notice has been given, but no duplicate or copy kept, it is not requisite to give a notice to produce the notice of dishonour; parol evidence of the contents, without a notice to produce, will be admitted. *Ackland v. Pearce*, 2 Camp. 601. (See cases cited *antè*, p. 6.) And where a duplicate original or copy of the notice has been kept, it is good evidence without notice to produce; *Kine v. Beaumont*, 3 B. & B. 288; and in the case of *Swain v. Lewis*, 2 C. M. & R. 263., it was held, after conference with all the judges, that it is not necessary to give a notice to produce a notice of dishonour of a bill of exchange. Secondary evidence of such notice is, therefore, admissible without proof of notice to produce it. But where, in an action against the indorser of a bill, it became necessary to prove that notice of the dishonour of *other bills* had been given to the defendant, for which purpose examined copies of letters containing such notices were offered, Abbott C. J. ruled that a notice to produce such letters was necessary, and that the case did not fall within the exception of bills which are the subject-matter of the action, and where no notice is necessary. *Lanauze v. Palmer*, M. & M. 31. *Antè* p. 6. Proof that duplicate notices of dishonour were written; that a letter, of which the witness could not state the contents, was sent on the same day by the plaintiff to the defendant; and that the defendant, having received notice to produce the letter written to him on that day, refused to do; was held slight *prima facie* evidence of the receipt of a notice. *Roberts v. Bradshaw*, 1 Stark. 28. acc. *Curlewis v. Corgfeld*, 1 Q. B. 814.

Protest.] A protest, where necessary, is usually stated in the declaration; but, if omitted, it seems to be involved in the allegation of notice, when that can only be legally given through a protest; the plaintiff should therefore, in such case, be prepared to prove it on an issue upon due notice. *Salomons v. Stavelly*, 3 Doug. 298. In case of a foreign bill, notice without a protest is not sufficient, unless the party to whom notice is given resides in this country; *Robins v. Gibson*, 1 M. & S. 288.; though he should happen at the time of the dishonour to be absent. *Cromwell v. Hynson*, 2 Esp. 511. But in giving notice of nonpayment to the drawer of a foreign bill (and one drawn in Ireland is a foreign bill) resident abroad, it is sufficient to inform him that the bill has been protested, without sending a copy of the protest. *Goodman v. Harvey*, 4 A. & E. 870. In case of an inland bill, a protest is of no effect. *Windle v. Andrews*, 2 B. & A. 696. The production of the protest, when made abroad, is sufficient proof of the protest. *Anon.* 12 Mod. 345. But a protest made in England must, it is said, be proved in the ordinary way. *Chitty on Bills*, 405., 7th ed. The presentment of a foreign bill in this country must be proved as if it were an inland bill; and the protest is not evidence of it. *Chesmer v. Noyes*, 4 Camp. 189.

By the 2 & 3 W. 4. c. 98., reciting that doubts had arisen as to the place in which it is requisite to protest, for nonpayment, bills of exchange which, on presentment for acceptance to the drawee or drawees, shall not have been accepted, &c., it is enacted—that, from and after the passing of that act, all bills of exchange wherein the drawer or drawers thereof shall have expressed that such bills of exchange are to be payable in any place other than the place by him or them therein mentioned to be the residence of the drawee or drawees thereof, and which shall not on the presentment for acceptance thereof be accepted, shall and may be, without further presentment to the drawee or drawees, protested for nonpayment in the place in which such bills of exchange shall have been by the drawer or drawers expressed to be payable, unless the amount owing upon such bill of exchange shall have been paid to the holder or holders thereof on the day on which such bills of exchange would have become payable had the same been duly accepted. This statute appears to have been occasioned by the case of *Mitchell v. Baring*, M. & M. 381.

Notice, proof of, when excused.] Whenever the want of notice is excused, the circumstance relied upon as the excuse must be stated in the declaration. Therefore, where the defendant told the indorsee beforehand not to send such notice, and that he would pay the amount, this is not evidence to support an averment of notice, but should have been pleaded as a dispensation of it; *Burgh v. Legge*, 5 M. & W. 418.; and proof of knowledge of dishonour is not equivalent to proof of notice. *Ibid.*

Notice excused; no effects.] When issue is joined on the want of effects in the hands of the drawee, the terms of the allegation will sufficiently indicate the required proof. It is enough if the drawer had effects on the way to the drawee. *Rucker v. Hiller*, 3 Camp. 217., S.C. 16 East, 43. So if the drawer had effects in the drawee's hands at the time when the bill was drawn, though at the time the bill was presented

for acceptance, and thence until presentment for payment, he had not any. *Orr v. Maginnis*, 7 East, 359. So, though there were no effects at the time the bill was drawn or accepted; provided there were effects when it became due; for the whole period must be looked to from the drawing of the bill till it is due; and notice is requisite if the drawee has effects at any time during that interval. *Hammond v. Dufrene*, 3 Camp. 145. *Thackray v. Blackett*, 3 Camp. 164. So if the drawer has effects in the hands of the drawee, though he is indebted to the drawee greatly beyond that amount. *Blackhan v. Doren*, 2 Camp. 503. So where the drawer has effects in the hands of the drawee, though to a less amount than the bill. *Thackray v. Blackett*, 3 Camp. 164.; but see *Smith v. Thatcher*, 4 B. & A. 200. So where there is a running account between the drawer and the drawee, and a fluctuating balance between them, and the drawer has reasonable grounds to expect that he shall have effects in the drawee's hands when the bill becomes due; per Lord Ellenborough C.J., *Brown v. Maffey*, 15 East, 221.; or where the bill is drawn in the reasonable expectation that, in the ordinary course of mercantile transactions, it would be accepted or paid; per Le Blanc J., *Claridge v. Dalton*, 4 M. & S. 231.; *France v. Lucy*, R. & M. 342.; *Lafitte v. Slatter*, 6 Bing. 623.; or where the acceptor has received from the drawer his acceptances upon which he has raised money, and some of which are outstanding. *Spooner v. Gardiner*, R. & M. 84. And, in general, where the drawer would have any remedy over against a third person, as in the case of a bill drawn for the accommodation of an indorsee, notice, and not an excuse of notice, ought to be alleged and proved. *Cory v. Scott*, 3 B. & A. 623. *Norton v. Pickering*, 8 B. & C. 610.

Where the bill is alleged to be an accommodation bill, the fact, that the drawer of a bill made it payable at his own house, is evidence of such averment. *Sharp v. Bailey*, 9 B. & C. 44.

Notice, strict proof of, dispensed with by promise to pay, or acknowledgment, &c.] A promise after dishonour of the bill to pay, if the holder would call again, is evidence of notice, and not an excuse of notice; *Lundie v. Robertson*, 7 East, 231.; so where the drawer of a foreign bill, on being told it was dishonoured, says that his affairs are at that moment deranged, but that he would be glad to pay it as soon as his accounts with his agents are cleared, this admission will dispense with proof of a protest. *Gibbon v. Coggon*, 2 Camp. 188. *Greenway v. Hindley*, 4 Camp. 52. Where the plaintiff gave in evidence an agreement made between a prior indorser and the defendant (the drawer), after the bill became due, reciting that the defendant had drawn, amongst others, the bill in question; that it was over due, and ought to be in the hands of the prior indorser; and that it was agreed that the latter should take the money due to him upon the bill by instalments; this agreement was held to dispense with notice of dishonour. *Gunson v. Metz*, 1 H. & C. 193. A payment, or promise by a party who has no notice of the acceptor's default, does not dispense with strict proof of notice. *Goodall v. Dolley*, 1 T. R. 712. *Pickin v. Graham*, 1 C. & M. 725. Where the drawer, being a foreigner, on being asked to pay the bill, said, "I am not acquainted with your laws; if I am bound to pay it, I will;" this was held not to dispense with proof of notice. *Dennis v. Morrice*, 3 Esp. 158. So of a mere offer

to compromise. *Cuming v. French*, 2 Camp. 106. (s). The drawer of a bill, being applied to for payment, said, "If the acceptor does not pay, I must; but exhaust all your influence with the acceptor first." The drawer afterwards directed the applicant to raise the money on the lives of himself and the acceptor. It was held that this admission was not to be taken as *conclusive* evidence of the defendant's having received, or waived, notice of dishonour of the bill. *Hicks v. Duke of Beaufort*, 4 New Ca. 229. See also *Brounell v. Bonney*, 1 Q. B. 39. *antè*, p. 217.

Where the drawer, before the bill became due, stated to the holder that he had no regular residence, but would call and inquire whether the bill would be paid, Lord Ellenborough held that proof of notice was unnecessary; *Phipson v. Kneller*, 4 Camp. 285., see also *Hill v. Heap, D. & R.*, N. P. C. 57.; but, *quære*, whether this was not rather a waiver of notice than proof of it?

Notice dispensed with by ignorance of drawer's residence.] Where notice is excused by the holder's ignorance of the place of residence of the defendant, it is a question for the jury whether he used due diligence to find it. *Baleman v. Joseph*, 12 East, 433. *Baldwin v. Richardson*, 1 B. & C. 245. Thus, it is not enough to shew that inquiries as to his residence were made at the place at which the bill was payable. *Beveridge v. Burgis*, 3 Camp. 262. Calling on the last indorser and last but one, the day after the bill becomes due, to know where the drawer lives, and, on his not being in the way, calling again the next day, and then giving the drawer notice, has been considered sufficient. *Browning v. Kinnear*, Gow. 81. Inquiry should be made of some of the other parties to the bill or note; and of persons of the same name. *Bayley on Bills*, 229., citing *Beveridge v. Burgis*, 3 Camp. 262. In one case it was held sufficient, on the dishonour of a promissory note, to make inquiry at the drawer's for the residence of the payee. *Sturges v. Derrick*, Wightw. 76. An attorney employed to discover the residence of a party to a bill, and discovering it, has, like a banker, a day to consult his employer; and it is sufficient if he forward the information to him on the next day. *Firth v. Thrush*, 8 B. & C. 387.

Where the holder is excused by special circumstances from giving notice on the usual day, the common allegation of notice is still sufficient. *Firth v. Thrush*, *suprà*.

Indorsee against Drawer.

In an action by the indorsee of a bill against the drawer, the declaration alleges the indorsement to the payee, and subsequent indorsements on the bill, as well as the matters alleged in an action by payee against drawer. The proofs therefore will be the same as in an action by the payee against the drawer, with the additional proof of the indorsements. The mode of proving a title by indorsement has already been stated, p. 209.

In an action by indorsee against drawer, it was pleaded that the bill was drawn by a partner, but not for partnership purposes, and was indorsed to the plaintiff after it became due: the replication was, that it was not indorsed after it became due, but was indorsed to, and taken and received by, the plaintiff before it became due, It

was held that it was sufficient for the plaintiff to put in the bill, and not necessary that he should give any evidence to shew that the bill was indorsed to him before it became due. *Parkin v. Moon*, 7 C. & P. 408.

A bill being drawn and indorsed in the name of the firm under which defendant and A. carried on business, a question arose whether the indorsement was before or after the partnership was dissolved. The bill was dated before the dissolution, but the indorsement was not dated. Held, that it might be left to the jury to say whether it was indorsed before or after; and that, as it was drawn payable to the defendants, the jury might reasonably infer that it was indorsed shortly after the drawing. *Anderson v. Weston*, 6 New Ca. 296.

Account stated.] Where defendant, knowing the plaintiff to be the indorsee of a bill which was due, promised him to pay it, Coleridge J. held that the plaintiff might recover on an account stated. *Oliver v. Dovatt*, 2 M. & Rob. 230.

Indorsee against Indorser.

In an action by an indorsee against the indorser of a bill, the plaintiff must prove the following matters, if traversed:—1. The signature of the defendant: 2. The indorsements between that of the defendant and the plaintiff, stated in the declaration: 3. The presentment to the drawee or acceptor, and the dishonour: 4. Due notice of the dishonour to the defendant. It is not necessary, as against an indorser, to prove the signature of the drawer or of prior indorsers; for the indorsement of the defendant admits the handwriting of the drawer, and the defendant cannot insist that it is a forgery. *Lambert v. Oakes*, 1 Ld. Raym. 443. So it admits the ability and signature of all antecedent indorsers. *Bayley on Bills*, 386. *Critchlow v. Parry*, 2 Camp. 192. In suing the indorser on nonpayment of the bill by the drawee, it is unnecessary to state an acceptance; and if stated, it need not be proved. *Tanner v. Bean*, 4 B. & C. 312. It is only necessary to prove a presentment for payment at the place, if any, pointed out in the acceptance. *Parks v. Edge*, 1 C. & M. 429.

The rules with regard to the presentment of the bill and notice of dishonour are, in general, the same in this action as in an action by the payee against the drawer. See *ante*. No evidence of a demand upon the drawer, or prior indorsers, is necessary. *Bromley v. Frazier*, 1 Stra. 441. The fact that the drawer has never had any effects in the hands of the drawee, will not excuse the want of notice to the indorser, who has no concern with the accounts between the drawer and acceptor; *Wilkes v. Jacks*, Peake, 202., *Brown v. Maffey*, 15 East, 216.; and the indorser without consideration (but without fraud) of a bill, the drawer and acceptor of which are fictitious persons, is entitled to notice. *Leach v. Hewitt*, 4 Taunt. 731. Proof of notice will be dispensed with by a promise of the defendant to pay; *Wilkes v. Jacks*, Peake, 202.; provided it be an express one; therefore the following letter from the indorser was held not to waive the proof of notice: "I cannot think of remitting till I receive the draft; therefore if you think proper you may return it to Trevor and Co., if you think me unsafe." *Borradaile v. Lowe*, 4 Taunt. 93. A promise, not made to

the plaintiff, but to another person who was holder of the bill at the time, will be sufficient. *Potter v. Rayworth*, 13 East, 418.

Evidence under the money counts.] An indorsement is *prima facie* evidence of money lent by the indorsee to his immediate indorser. *Bayley on Bills*, 288. But where the indorser told his indorsee just before presentment, that the bill would not be paid, that notice need not be sent to him, and that he would send the money on a future day, this was held no evidence on an account stated; there being no debt due from the indorser at the time of the promise; nor any proof of his liability on the bill. *Burgh v. Legge*, 5 M. & W. 418.

Defence.

By the New Rules H. T. 4 W. 4., in actions on bills or notes the pleas of *non assumpsit*, or *nunquam indebtedatus*, are inadmissible. The defendant must traverse some matter alleged, or plead in confession or avoidance. (See Appendix No. I.) If an executor declares on a bill or note payable to his testator, laying a promise to pay the executor, such promise may still be denied by *non assumpsit*; for the action is not on the bill simply, but on a promise not implied by it. *Tinnis v. Platt*, 2 M. & W. 720.

The proofs, required on a special traverse of facts alleged in the declaration, have already been considered. The following are some of the most usual defences to actions on bills.

Stamp.] No stamp, or a wrong one, is a defence admissible under a traverse of the drawing or acceptance. *Dawson v. Macdonald*, 2 M. & W. 26. *M'Dowall v. Lyster*, 2 M. & W. 52. So in an action on a banker's check it is competent for the defendant to shew that it was post dated, on a traverse of the making of the check. *Field v. Woods*, 7 A. & E. 114. See *antè*, p. 157.

Alteration.] An alteration of such a kind as to discharge the acceptor may be taken advantage of under a traverse of the acceptance. *Cock v. Corwell*, 2 C. M. & R. 291. But the plaintiff may nevertheless recover on a count for the original consideration; *Atkinson v. Hawdon*, 2 A. & E. 628.; though a promise to pay the bill, coupled with a denial of liability on it, is not evidence of an account stated. *Calvert v. Baker*, 4 M. & W. 417. Where the defendant had paid interest on an altered note, this was held to be evidence of an alteration by his consent. *Carris v. Tattersall*, 2 M. & G. 890. It is for the party, who sues on an altered instrument, to give some evidence to explain it. *Clifford v. Parker*, *Id.* 909. See further as to alterations which avoid bills under the stamp acts, *antè*, p. 164, 165.

Fraud.] Fraud, which makes the contract void or voidable as against the defendant, must be specially pleaded. See New Rules, H. T. 4 W. 4. But where the fraud is one which avoids the consideration, it may be given in evidence under a plea denying the consideration. *Mills v. Oddy*, 2 C. M. & R. 103. In an action by indorsee against drawer, the defendant pleaded that the bill was drawn by him, and indorsed for a special purpose to L., who in fraud of such purpose

delivered it to H. without consideration, and that the plaintiff was not a *bonâ fide* holder for value; replication *de injuriâ*; held, that plaintiff was entitled to a verdict on this issue, if he proved that he gave value for the bill; and that defendant could not be admitted to shew that the plaintiff was privy to the fraud. *Uther v. Rich*, 10 A. & E. 784. The maker of a note pleaded that it was made and delivered to W. only to get it discounted, and that W. fraudulently indorsed it to the plaintiff, who gave no consideration, and knew of the fraud; replication *de injuriâ*; letters written by W., while holding the note, are not admissible against the plaintiff to prove the fraud, without first establishing, *aliunde*, a privity between the plaintiff and him. *Phillips v. Cole*, 10 A. & E. 106.

Imbecility of the defendant.] This defence is not open to the defendant under a traverse of the making of a note, since the new rules. *Harrison v. Richardson*, 1 M. & Rob. 504.

Forgery.] Forgery of the defendant's signature is, of course, evidence under a traverse of it; but he cannot be permitted to prove, for this purpose, that other bills, with forged signatures of the defendant, had been in the hands of the plaintiff and circulated by him. *Griffiths v. Payne*, 11 A. & E. 131.

Want of consideration — Onus probandi.] Since the introduction of the new rules, some doubt has existed with regard to the party upon whom the *onus* of proving the consideration, or want of consideration, when pleaded, rests. The point depends in some measure upon the form of the pleadings.

A bill or note imports a consideration; the holder is therefore presumed to have given value for it; and, before the late rules of pleading, the party, who sued as such, could not, in general, be put upon proof of such consideration (where the want of it would be a defence), without previous notice of an intention to dispute it, and proof of something to throw doubt upon the plaintiff's title to the bill. Thus, if the defendant, or party who ought to put it into circulation, had not in fact negotiated it, but had lost it by fraud, felony, or accident, it was a probable inference that the person who had obtained a bill by such means would put it away for less than its value. Upon proof therefore of such facts, the holder was required to shew a consideration. See the judgment of the court in *Percival v. Frampton*, 2 C. M. & R. 180., and *Mills v. Barber*, 1 M. & W. 425. Since the new rules, a special plea, alleging want of consideration, is equivalent to notice, and dispenses with it; but the old rule of practice continues so far to prevail, that, where the defence is founded simply on want of consideration (as in actions between immediate parties), and the plea alleges such want of consideration, which the plaintiff denies, the defendant is still bound to give evidence, in the first instance, in support of his plea. *Percival v. Frampton*, 2 C. M. & R. 180. *Batley v. Catterall*, 1 M. & Rob. 379. So where the plaintiff replied to such a plea that there was a consideration, "to wit, the sale of goods by the plaintiff to the defendant," concluding to the country, the defendant was held liable to the burden of proof; *Low v. Burrows*, 2 A. & E. 483. But where the plaintiff, instead of merely denying the defendant's allegations, states a specific

consideration in terms that make the proof of it part of the issue, then the proof of it lies upon the plaintiff. *Bailey v. Catterall, ubi supra*.

The plea sometimes alleges, not only want of consideration in the plaintiff, but also fraud or some other matter in a prior party throwing suspicion on the title to the bill. In this case, when the replication puts in issue the whole plea, (as when *de injuriâ*, &c. is replied), it should seem that it will be enough, in the first instance, for the defendant to prove the fraud; for this, according to the old practice, puts the plaintiff on proof of consideration. See *Percival v. Frampton*, and *Mills v. Barber, ubi supra*.

But where the plea alleges both fraud, and want of consideration, and the replication simply traverses the want of consideration, a difference of opinion exists as to whether this be such an admission of fraud on the record, as to put the plaintiff on proof of consideration.

The Court of Exchequer has held that it is *not* such an admission; but that the fraud or other circumstance of suspicion must be proved at the trial, in order to oblige the plaintiff to prove that he has given value. *Edmunds v. Groves*, 2 M. & W. 642. *Smith v. Martin*, 9 M. & W. 304. On the other hand, the Court of Queen's Bench has held, that an admission on the record must be taken as an admission for every purpose in the cause, and that the plaintiff is therefore bound, on such a state of the record, to prove consideration. *Bingham v. Stanley*, 1 Q. B. MS. As long as this point remains unsettled, it will, of course, be necessary for the plaintiff, on such a state of the record, to provide himself with evidence either to prove that he has given value, or to negative the alleged fraud or other ground of suspicion: and the defendant, who cannot prove the alleged want of consideration, must be prepared with proof of so much of the alleged fraud as will be enough to put the plaintiff on proof of value given.

The cases above cited, in which the contradictory opinions have been expressed, are perhaps not irreconcilable in themselves. In *Edmunds v. Groves*, the indorsee sued the maker of a note, who pleaded that he had made it to secure a gaming debt, and that it was indorsed to the plaintiff with notice and without consideration. The plaintiff replied that it was indorsed without notice and for value; on which issue was joined. At the trial, no evidence being given, the judge directed a verdict to be entered for the plaintiff, and the Court of Exchequer held the direction right. In *Bingham v. Stanley*, the drawer of a check payable to bearer pleaded that he gave it to secure a debt due to L. on a gaming transaction; that L. delivered it to the plaintiff without consideration, who was suing on it for L.'s benefit: Replication, that L. delivered it to the plaintiff for a good consideration; and issue thereon. The Court of Queen's Bench held, in opposition to the ruling of Lord Denman C. J. at Nisi Prius, that the plaintiff was bound to prove that he had given value. In this case the court assented to the decision of the Court of Exchequer, but dissented from the principles laid down by the court in giving judgment. In *Smith v. Martin*, the plaintiff sued the maker of a note who indorsed it to F., who indorsed to G., who indorsed to the plaintiff. Plea, that while the note belonged to G., his claim on it was referred to arbitration by an order made by consent; and that G., against good faith, indorsed it to the plaintiff before award made, who took it with knowledge of the pre-

mises. Issue was joined on a replication denying the plaintiff's knowledge of the premises when he took the bill. The defendant before trial gave notice to the plaintiff to prove a consideration for the indorsement to him. The Court of Exchequer held, that the defendant was bound to begin by proving knowledge of the fraud.

Before the two last cases were decided, the following case occurred at Nisi Prius. In an action by indorsee and acceptor, the defendant pleaded, that he had accepted for the drawer's accommodation, who had indorsed the bill to A. B. without consideration to get it discounted; that A. B. had fraudulently indorsed it to C. D. without consideration, who indorsed it to the plaintiff without consideration: Replication, *de injuriâ*, &c. Lord Denman C. J. held the defendant bound to prove the want of consideration between the plaintiff and C. D., as well as the previous allegations in the plea. *Brown v. Philpot*, 2 M. & Rob. 285. Upon this case it may be observed, that the allegation of fraud was not material to the defence; and that the mere fact of the bill being an accommodation bill was not sufficient to raise an inference against the holder's title, so as to put him on proof of consideration. See *Percival v. Frampton*, 2 C. M. & R. 180. *Mills v. Barber*, 1 M. & W. 425.

Where the defendant pleaded that the bill was an accommodation bill, indorsed to plaintiff's indorser for a special purpose, and by him indorsed to plaintiff after it was due in fraud of defendant, and the plaintiff traversed the taking it after it was due, it was held that the defendant must begin and shew that the bill was due when indorsed. *Lewis v. Parker*, 4 A. & E. 638.

Failure or want of consideration, proof of.] In an action by indorsee against acceptor, it is not even *prima facie* evidence of want of consideration between the defendant and the drawer to shew that the drawer, on the day before the bill became due, procured all the indorsements to be made without consideration, in order that the action might be brought by the indorsee on the understanding that the money should be divided between one of the indorsees and the drawer. *Whitaker v. Edwards*, 1 A. & E. 638. When the drawer makes the bill payable at his own house, it is evidence of an accommodation acceptance. *Sharp v. Bailey*, 9 B. & C. 44. In an action against a drawer by his indorsee, where defendant pleaded that the bill was given in payment for hops of a certain quality to be delivered by plaintiff, and that he did not deliver such hops, "or any hops whatever;" to which plaintiff replied *de injuriâ*, &c.; it was held enough for the defendant to prove the delivery of some hops of an inferior quality; and the plaintiff was not permitted to shew an acceptance of them by the defendant on this issue. *Wells v. Hopkins*, 5 M. & W. 7. In an action by payee against maker, defendant pleaded that the note was given to the plaintiff in consideration that he would pay the defendant's creditors, and that he promised to pay them, but had not; the replication averred that the note was delivered to plaintiff for the purpose of paying the creditors when the note was paid by defendant, and specially traversed the promise as alleged in the plea. Issue being joined on the traverse, it was held that the plaintiff entitled himself to a verdict by proving the inducement of his replication; for he thereby negated the promise. *Cole v. Cresswell*, 11 A. & E. 661. Where the plea to an action on a note states an executory consideration for it, which was never executed; and the plaintiff replies *de*

injurii, &c.; the defendant is not precluded from proving his plea, although the note professes on the face of it to be founded on a past consideration. *Abbott v. Hendricks*, 1 M. & G. 791.

In general, the declarations of the former holder of a bill are not admissible to prove the want of consideration. *Shaw v. Broom*, 4 D. & R. 730. But where the title of the plaintiff, and of the party whose declarations are offered in evidence, is identified; as where the plaintiff took the bill from him after it became due; such declarations are admissible. *Benson v. Marshal*, cited 4 D. & R. 732. *Beauchamp v. Parry*, 1 B. & Ad. 89. And where the plaintiff, though he did not take the bill after it was due, sues as agent for the party who made the declarations, such declarations are admissible. *Welstead v. Levy*, 1 M. & Rob. 138.

[*Illegality of consideration; bona fides of holder.*] In general, this objection is confined to persons, who are parties, or privies, to the illegality, and those to whom they have passed the bill without value; *Bayley on Bills*, 4th ed.; and a *bona fide* indorsee for value, without notice of the illegality, may recover on such bill. *Wyat v. Bulmer*, 2 Esp. 538. The question for the jury is now settled to be whether the party taking the bill acted with good faith? Gross negligence may be evidence of *mala fides*, but is not equivalent to it. *Goodman v. Harvey*, 4 A. & E. 870. Where the bill was given for money lost by gaming, or upon an usurious contract, or to secure money paid to induce a bankrupt's creditors to sign his certificate, various statutes made it a void security even in the hands of a *bona fide* holder; but by 58 G. 3. c. 93. and by 5 & 6 W. 4. c. 41., so much of the former statutes as made the securities void, is repealed, and by the last act it is enacted that they shall be deemed to have been executed for an illegal consideration.

Where the defence is usury in the indorsement, the usury must be clearly proved; suspicion is not sufficient; and in an action by the indorsee against the indorser, a conversation between the drawer and one J., a relation of the plaintiff, and who got the bill discounted for the drawer, is not evidence against the plaintiff, without proof that he was agent for him, although it appears that usurious discount was deducted by J. *Bassett v. Dodgin*, 10 Bing. 40. Usury, however, is no longer illegal in a bill or note payable at twelve months or less. 2 & 3 Vict. c. 37., continued till the 1st of January, 1844, by 4 & 5 Vict. c. 54. On a plea that the note was given for an illegal purpose, on which issue is taken, the plaintiff is not bound to produce it either as part of his own case or of the defendant's, though called upon to do so at the trial. *Read v. Gamble*, 10 A. & E. 597. In an action by the indorsee against the maker of a promissory note, letters from the payee to the maker, contemporaneous with the making of the note, were admitted to prove usury in the concoction of the note; *Kent v. Louven*, 1 Camp. 177. 180. d.; but the ground of the decision seems to have been that the letters were parcel of the usurious contract itself. See *Beauchamp v. Parry*, 1 B. & Ad. 89., and *antè*, p. 31.

It will be seen by several of the cases cited under the head of *Want of Consideration*, *antè*, p. 225., that illegality in the concoction or transfer of a bill, as well as fraud, felony, &c., will, if proved, put the holder on proof of consideration. See also *Bassett v. Dodgin*, 10 Bing. 40.

Satisfaction.] Payment, or satisfaction, must now be specially pleaded. For presumptive evidence of such plea, see the cases cited *ante*, p. 21. A judgment against a subsequent party to a bill will be no satisfaction so as to discharge a prior party; it is only an extinguishment between the parties to the judgment. *Hayling v. Mulhall*, 2 W. Bl. 1235.; *English v. Darley*, 2 B. & P. 62. So taking the acceptor in execution is no discharge of the drawer. *Macdonald v. Bovington*, 4 T. R. 825. But a composition with the acceptor, and the taking a third person's note as a security for it, operates as a satisfaction of the bill. *Lewis v. Jones*, 4 B. & C. 513. *Perfect v. Musgrave*, 6 Price, 111. Such defence must be pleaded specially. So where the first bill is "renewed" by taking a second. *Kendrick v. Lomax*, 2 C. & J. 405. But where the plaintiff held a bill accepted by defendant, who, when it became due, asked for time, and afterwards gave plaintiff another bill for the same amount, plaintiff telling him at the same time that something was due for interest, and continued to hold the first bill, and the second bill was paid after it became due; it was held that plaintiff was entitled to sue on the first bill to recover the interest. *Lumley v. Musgrave*, 4 New Ca. 9. Where one of three partners, after a dissolution of partnership, undertook, by deed, to pay a particular partnership debt on two bills of exchange, which was communicated to the holder, who consented to take the separate notes of the one partner for the amount, *reserving his right against all three*, and retaining possession of the original bills, it was held that the separate notes having proved unproductive, he might resort to his remedy against the other partners, and that the taking the separate notes, and afterwards renewing them several times successively, did not amount to satisfaction of the joint debt. *Bedford v. Deakin*, 2 B. & A. 210. So where, on a bill of exchange being dishonoured, the acceptor transmitted a new bill for a larger amount to the payee, but had not any communication with him respecting the first, and the payee discounted the second bill with the holder of the first, which he received back as part of the amount, and afterwards, for a valuable consideration, indorsed it to the plaintiff; it was held that the second bill was merely a collateral security, and that the receipt of it by the payee did not exonerate the drawer. *Pring v. Clarkson*, 1 B. & C. 14.; see also *Adams v. Bingley*, 1 M. & W. 192. Satisfaction as to one of several partners is a satisfaction as to all. *Jacaud v. French*, 12 East, 317. On a plea of payment, neither the plaintiff nor the defendant is bound to produce the note; nor is the defendant obliged to give notice to produce it: and where the plea stated, by way of introduction to an allegation of payment, that the note was given in lieu of a former one, and the plaintiff replied *de injuriâ* generally, it was held enough to shew payment without proving the superfluous introductory matter; and that, in any future action, a verdict for the defendant on such plea would be no evidence against the plaintiff of such superfluous statements. *Shearm v. Burnard*, 10 A. & E. 593.

Discharge and waiver.] An acceptor may be discharged from liability by an express renunciation by the holder; thus, where the holder agreed to "consider the acceptance at an end," made an entry to that effect in his account book, and abstained for three years from suing him, the acceptor was discharged. *Walpole v. Pulteney*, cited 1 Doug. 249. So a message to the acceptor of an accommodation bill, that the

business was settled with the drawer, and he need give himself no farther trouble, is an express waiver, and a good defence in an action against the acceptor. *Black v. Peele*, cited 1 *Doug.* 248. But a declaration by the holder, that "he should look to the drawer for payment, and that he wanted no more of the acceptor than another debt not connected with the bill," will not be sufficient to discharge the acceptor. *Parker v. Leigh*, 2 *Stark.* 228. If the holder receives part of the money from the drawer, and takes a promise from him, upon the back of the bill, for the payment of the residue at an enlarged time, it is for a jury to say whether this is not a waiver of the acceptance; *Ellis v. Galindo*, cited 1 *Doug.* 250.; but see *Dingwall v. Dunsler*, 1 *Doug.* 247., where it was held that nothing but an express declaration by the holder will discharge the acceptor. See also *Parker v. Leigh*, 2 *Stark.* 228. *Farquhar v. Southey, M. & M.* 14.

Giving time.] Giving time to a principal discharges a surety; and therefore giving time to the acceptor discharges the drawer and indorsers. *English v. Darley*, 2 *B. & P.* 61. So giving time to any prior party discharges subsequent ones. *Hall v. Cote*, 4 *A. & E.* 577. This defence requires a special plea; so that the pleadings on the record sufficiently apprise the parties of the nature of the requisite proofs. A conditional agreement to give time to the acceptor on his paying part, which condition is not performed by the acceptor, is not a discharge to the indorsers. *Badnall v. Samuel*, 3 *Price*, 521. Forbearance to sue the acceptor is not of itself equivalent to a discharge. *Walwyn v. St. Quentin*, 1 *B. & P.* 652. *English v. Darley*, 2 *B. & P.* 61. Taking a *cognovit* from the acceptor, by which the time of obtaining judgment against him is not deferred, is not a giving time. *Jay v. Warren*, 1 *C. & P.* 532. Even before the new rules, the taking a warrant of attorney from the acceptor after action brought against the indorser, could not be given in evidence under the general issue in the latter action; being matter of defence arising after action brought. *Lee v. Levy*, 4 *B. & C.* 390.

Where a bill was accepted for the accommodation of the drawer, and the holder, knowing that circumstance, gave time to the drawer, Lord Ellenborough held the acceptor discharged; *Laxton v. Peat*, 2 *Camp.* 185.; but this case has been frequently doubted; and it has been since held that, notwithstanding a release to the accommodated drawer, the holder who knew at the time of the release (but not when he took the bill) that it was an accommodation bill, may sue the acceptor. *Harrison v. Courtauld*, 3 *B. & Ad.* 36. *Nichols v. Norris*, *Id.* 41. Where time was given to the accommodation acceptor, Lord Ellenborough ruled that the drawer was not discharged. *Collott v. Haigh*, 3 *Camp.* 281. So where the acceptor is the agent of the drawer, the latter will not be discharged by time given to the former. *Clarke v. Noel*, 3 *Camp.* 411. An agreement between the plaintiff and a stranger to give time to the acceptor will not discharge an indorser; therefore where an indorser pleaded an intermediate indorsement by him to H. and by H. to the plaintiff (not stated in the declaration), and an agreement between the plaintiff and H. to give time to the acceptor and all other parties, the indorsement by H. was held a material averment to be proved; for otherwise he was no party to the bill, but a stranger: And

semb. such a plea should aver that the acceptor was party to the agreement, or privy to it. *Lyon v. Holt*, 5 M. & W. 250.

Competency of Witness.

Drawer.] In an action against the acceptor, the drawer is in general a competent witness either for the plaintiff or for the defendant; for, if the plaintiff recovers, the drawer pays the bill by the hands of the acceptor; if the plaintiff fails, the drawer is liable to pay the bill himself. *Bayley on Bills*, 149. Thus, he may be called by the plaintiff to prove the defendant's handwriting; *Dickinson v. Prentice*, 4 Esp. 32; or by the defendant to prove illegality; *Brard v. Ackerman*, 5 Esp. 119. *Rick v. Topping, Peake*, 224; or payment; *Humphrey v. Mason, Peake*, 52. And it is no objection that he is a prisoner on a charge of having forged the bill. *Barber v. Gingell*, 3 Esp. 62. But where the acceptor has accepted the bill for the accommodation of the drawer (the witness), the latter was held not a competent witness for the defendant; for if the plaintiff should fail, the witness would be discharged from his liability to indemnify the defendant against the costs of the action on the bill. *Jones v. Brooke*, 4 Taunt. 464. But the late act, 3 & 4 W. 4. c. 42. s. 26., has, it seems, altered the law in this case; for where the acceptor, being sued by the indorsee, pleaded an acceptance for the accommodation of the drawer, and usury between the drawer and the plaintiff, and the replication denied the usury, Cresswell J. admitted the drawer as a witness for the defendant. *Flight v. Hammond*, 2 M. & G. 383. n. (a). Where the witness had become bankrupt, and the costs were provable under the commission, and he had obtained his certificate, he was held admissible at common law. *Brind v. Bacon*, 5 Taunt. 183. *Moody v. King*, 2 B. & C. 558. Where a bill has been drawn by one partner, in fraud of the rest, to pay a separate creditor, a copartner is a competent witness for the acceptor in an action against him by the creditor to prove the want of authority. *Ridley v. Taylor*, 13 East, 175.

Indorser.] In an action by the indorsee against the drawer or acceptor, the indorser is (without the aid of 3 & 4 W. 4. c. 42.), a competent witness either for the plaintiff or the defendant;—for the plaintiff, because, though the plaintiff's succeeding in the action may prevent him from calling for payment from the indorser, it is not certain that it will; and whatever part of the bill or note the indorser is compelled to pay, he may recover again from the drawer or acceptor;—for the defendant, because if the plaintiff fails against the drawer or acceptor, he is driven either to sue the indorser, or to abandon his claim. *Bayley on Bills*, 422. He may be called for the plaintiff to prove his own indorsement; *Richardson v. Allan*, 2 Stark. 334; or (upon a bill drawn for his own accommodation) that the plaintiff, the indorsee, gave him value for it; *Shuttleworth v. Stephens*, 1 Camp. 406; or that the defendant promised to pay the bill after it became due; *Stevens v. Lynch*, 2 Camp. 332. For the defendant the indorser may be called to prove that he had paid the bill; *Charrington v. Milner, Peake*, 6; *Birt v. Kirshaw*, 2 East, 458; or that an unstamped bill, dated abroad, was, in fact, made here. *Jordaine v. Lashbrooke*, 7 T. R. 601.

In an action by the indorsee against the acceptor, the indorser,

though released by the defendant, was held incompetent to prove for him that he delivered the bill to the plaintiff merely for the purpose of procuring payment as agent for the witness, on the ground that the success of the plaintiff would make it more difficult for the witness to get back his money than if he failed. *Buckland v. Tankard*, 5 T. R. 578. But this decision has been doubted. *Birt v. Kershaw*, 2 East, 458., 1 *Phill. Ev.* 63., 6th ed. ; and in *Reay v. Packwood*, 7 A. & E. 917., the plaintiff's indorser was admitted, without a release, to prove payment by the acceptor to the plaintiff, though he stated on the *voire dire* that he had received money from the defendant to pay it, and was therefore liable to the defendant in damages, if he neglected to pay.

In an action against the indorser of a bill, a prior indorser, for whose accommodation the bill was indorsed by the defendant, and who has become bankrupt and obtained his certificate, is a competent witness for the defendant ; since the amount of the bill and the costs sustained by the defendant are proveable against the estate of the witness by 6 G. 4. c. 16. s. 52. *Bassett v. Dodgin*, 9 Bing. 653.

Drawee or acceptor.] The acceptor is a competent witness for the plaintiff to prove that he had no effects of the drawer, the defendant, in his hands ; *Staples v. Okines*, 1 *Esp.* 332. ; for though the plaintiff recovers, the witness remains liable to the defendant. So the drawee may be called to prove the same fact. *Legge v. Thorpe*, 2 *Camp.* 310. In an action against a drawer, it was held that the acceptor was not a competent witness for the defendant to prove a set-off ; on the ground that he was answerable to the drawer only to the amount which the plaintiff recovered against the defendant ; *Mainwaring v. Mytton*, 1 *Stark.* 83. ; yet it seems that the drawer would be entitled to call upon the acceptor for the full amount of the bill. *Bayley on Bills*, 424. See *Reid v. Furnival*, 1 C. & M. 538. A declaration by the drawee, that the drawer, the defendant, had no effects in his hands, would, it seems, be evidence against the drawer, if made at the time of presentment, though not if made subsequently ; *Prideaux v. Collier*, 2 *Stark.* 57. ; on the ground that the drawee is, for that purpose, the agent of the drawer.

In an action against the drawer and indorser of a bill, the acceptor was called for the defendant to prove that, after being accepted by him and indorsed by the defendant, the bill was put into his (the acceptor's) hands for the purpose of getting it discounted ; that he took it for that purpose to the plaintiff, who, having got hold of it, refused either to discount or return it. It was held that the witness was incompetent on the ground of interest ; and *per* Lord Tenterden, " The testimony was properly rejected : It appeared by the statement of the defendant's counsel that the witness was answerable for the payment of the bill by himself, and there was an implied undertaking by him to indemnify Lowe (the drawer and defendant). He was, therefore, interested in the result of the action, inasmuch as the costs, if the plaintiff succeeded, would ultimately fall on himself." *Edmonds v. Lowe*, 8 B. & C. 407. The case, however, was decided before 3 & 4 W. 4. c. 42. See *Faith v. McIntyre*, 7 C. & P. 44.

ASSUMPSIT ON PROMISSORY NOTES.

In general, the rules and cases relating to the proof of the drawing, indorsing, presentment, and notice of dishonour, &c. of bills of exchange, apply also to promissory notes. Where a different rule prevails, the distinction will be noticed.

Payee against Maker.

The making of the note.] The making of the note is proved by proving the handwriting of the defendant; or, if made by an agent, by proof of the handwriting and authority of such agent. An admission by the defendant that the handwriting is his, will be sufficient proof (in the case of an unattested note) though it was made pending a treaty for a compromise. *Walldridge v. Kennison*, 1 *Esp.* 143. An offer on the part of the defendant, after the note has become due, to give another note to the plaintiff instead of it, is an admission of the plaintiff's title. *Bosanquet v. Anderson*, 6 *Esp.* 43. An admission of his signature by one of the parties, will only be evidence against himself. *Gray v. Palmers*, 1 *Esp.* 135. If the note is for less than 5*l.*, it must be attested by a subscribing witness, 7 G. 3. c. 30. s. 1., and such attesting witness must be called; or if dead, or he cannot be found, his handwriting must be proved, and some evidence must be given of the identity of the maker of the note. *Whitelocke v. Musgrove*, 1 C. & M. 511. S. C. 3 Tyr. 541.

Presentment.] Where the promise to pay is general, no presentment to the maker need be proved. But where the note contains in the body of it, and not merely in a memorandum at the foot, a promise to pay at a particular place, a presentment at such place must be proved; but notice of the dishonour to the maker is unnecessary. *Pearse v. Pemberthy*, 3 *Camp.* 261. Circumstances which would excuse the presentment, as that the maker could not be found, cannot be given in evidence under the general allegation of presentment; *Leeson v. Pigott*, *Bayley on Bills*, 324.; and see *Smith v. Bellamy*, 2 *Stark.* 223.; *Hine v. Alley*, 4 B. & Ad. 624.; *ante*, p. 214.; but if a note be made payable at a particular town, and the maker has no residence there, a presentment at the banking-houses there will support an allegation that it was presented there to the maker. *Hardy v. Woodroffe*, 2 *Stark.* 319., *Bayley on Bills*, 324. A note payable at two places may be presented at either. *Beeching v. Gower*, *Holt, N. C. P.* 313. In an action on a note payable on demand, a demand need not be alleged or proved; for the action itself is a demand. *Rumball v. Ball*, 10 *Mod.* 38. Where a promissory note was in the following form: "I promise to pay to M. or bearer, on demand, the sum of 16*l.* at sight;" it was held that an action was not maintainable without a presentment for sight. *Dixon v. Nuttall*, 1 C. M. & R. 307.

Evidence under the common counts.] A promissory note is evidence of money lent by the payee to the maker. *Bayley on Bills*, 286. Where a note cannot be given in evidence for want of a proper stamp, the plaintiff may recover on the consideration of the note, if the declaration contains counts on such consideration, and if he is not pre-

cluded from availing himself of them by the terms of his particular. *Farr v. Price*, 1 East, 58. And the note may be used as evidence of the terms of a loan of money, though avoided by an alteration without a fresh stamp. *Sutton v. Toomer*, 7 B. & C. 416. So illegality in a note, given to secure a pre-existing debt, will not prevent a recovery of the debt. *Per Bayley J. Ibid.* The plaintiff will not be allowed to resort to the money counts, if the note has been lost; unless he can prove it destroyed, or shew that the defendant cannot be again subjected to the payment of it. *Dangerfield v. Wilby*, 4 Esp. 159. Nor can he resort to them, where he has made a note his own by laches. *Camidge v. Allenby*, 6 B. & C. 373.

Indorsee against Maker.

In an action on a promissory note by an indorsee against the maker, the plaintiff will have to prove the making of the note by the defendant, and the indorsement stated in the declaration, if traversed.

It has been already stated, *antè*, p. 209, 210. in what manner an indorsement, and what indorsements, are to be proved. Where indorsements are unnecessarily mentioned, as in declaring upon a note made to payee or bearer, they must, if traversed, be proved. *Waynam v. Bend*, 1 Camp. 175. But the finding on such an issue would be immaterial.

Evidence under the common counts.] A promissory note is only evidence on the money counts as between immediate parties. *Waynam v. Bend*, 1 Camp. 175.

Indorsee against Indorser.

In an action by an indorsee against the indorser of a promissory note, the traversable allegations are, the defendant's indorsement; the presentment to the maker; his default; and notice to the defendant of the dishonour. The indorsee of a note cannot declare against his indorser as maker, even when the latter has indorsed a note not payable or indorsed to him, so that the indorsee cannot sue the maker. For it is not true that every indorser of a note is a fresh maker, though every indorser of a bill is in the nature of a fresh drawer. *Guinnell v. Herbert*, 5 A. & E. 436.

Indorsement.] In what manner an indorsement must be proved has been already stated. It admits all prior indorsements, and also the handwriting of the maker. *Free v. Hawkins, Holt*, N. P. C. 550.

Presentment.] In what manner a note or bill of exchange must be presented, has been stated, *antè*, p. 212. Where a note is made payable in the body of it at a particular place, it must be presented there. But if issue is joined on the fact of such presentment, a promise by the defendant to pay the note is evidence against him. *Crozon v. Worthen*, 5 M. & W. 5., *antè*, p. 214.

Notice of dishonour.] It has been before stated by and to whom, and within what time, notice must be given; and, what will be considered sufficient proof of the delivery of the notice, and of its contents, *antè*, p. 216,

217. It has also been shewn in what cases proof of notice may be dispensed with by an acknowledgment on the part of the defendant of his liability. Where the payee of a note indorses it for the accommodation of the maker, it is still necessary to give notice to the payee in order to charge him, and it is no defence that it was agreed between the parties that the note should not be put in force. *Free v. Hawkins*, 8 Taunt. 92.

Evidence under the common counts.] An indorsement is evidence of money lent by the indorsee to the indorser. *Kessebower v. Tins*, Bayley on Bills, 288.

Competency of Witness.

Maker.] The maker of a promissory note is a competent witness for the plaintiff, in like manner as the acceptor of a bill of exchange; and one of the joint makers of a note is a competent witness for the plaintiff, to prove the signature of the defendant, the other joint maker. *York v. Blott*, 5 M. & S. 71. In an action by the indorsee against the payee of a note, the maker may be called to prove an alteration. *Levi v. Essex*, 2 Esp. Dig. 211., 4th ed. And he may be called to prove a notice, in an action by indorsee against indorser. *Verning v. Shuttleworth*, Bayley on Bills, 422.

It was held that, at common law, a joint maker of a promissory note, is not a competent witness for the defendant to prove a plea of illegality of consideration in an action brought against the other maker alone. Nor was he rendered competent by having paid the plaintiff half the amount of the note before action brought, the note bearing interest on the face of it, and a year's interest having been due at the time of the payment; for he would have been liable for contribution in respect of such interest. *Slegg v. Phillips*, 4 A. & E. 852. But stat. 3 & 4 W. 4. c. 42. sect. 26. has rendered a joint maker competent for the other maker; for contribution could not be obtained from him without producing the record of the recovery against the defendant. *Russell v. Blake*, 2 M. & G. 374. In an action by payee against one of three joint makers, another of the makers was held competent for the plaintiff to prove the making, though he stated on the *voir dire* that he and the other maker (not sued) signed as sureties of the defendant, and that his co-surety was insolvent. *Page v. Thomas*, 6 M. & W. 733.

Indorser.] The indorser of a note is in general a competent witness either for the plaintiff or defendant, in an action by a subsequent indorsee against the maker. But the payee of a note made for his accommodation, who has become bankrupt and obtained his certificate subsequently to the date of the note, was held (before 3 & 4 W. 4. c. 42.) not a competent witness for the defendant, the maker, to prove that the note was indorsed to the plaintiff after it became due; for he was no longer liable to the plaintiff, though he still remained liable to the defendant, if the latter should be compelled to pay the note. *Maundrell v. Kennett*, 1 Camp. 408. (n). The payee of an accommodation note, who has indorsed it to the plaintiff, was held competent for the plaintiff to prove that he indorsed it for a valuable consideration; having an equal interest on both sides. If the plaintiff succeeds, the

witness becomes liable to the defendant; if the defendant succeeds, the witness remains liable to the plaintiff. *Shuttleworth v. Stephens*, 1 Camp. 407.

ASSUMPSIT ON POLICIES OF MARINE INSURANCE.

By a traverse of the allegations in the declaration, the plaintiff may be called upon to prove the following facts; viz., the subscription or execution of the policy by the defendant; the interest of the party as averred; the putting of the goods &c. on board, when the policy is on goods; the inception of the risk; compliance with warranties, if any; a licence, for the purpose of legalizing the voyage, in some cases; the loss; and the amount of it.

Proof of the policy.] On a plea of *non assumpsit*, the policy must be produced and proved; and if subscribed by an agent of the defendant, the handwriting and authority of the agent must be proved. If the authority was in writing it should be produced. The authority may also be proved by shewing that the defendant has recognised the act of the agent in this instance, or in other similar instances in which the same agent has subscribed policies for the defendant; *Neal v. Erving*, 1 Esp. 61.; and where a witness stated that he was authorized by power of attorney, but added that the defendant had been in the habit of paying losses upon policies which the witness had subscribed in his name, Lord Ellenborough ruled that the power of attorney need not be produced. *Haughton v. Ewbank*, 4 Camp. 88. *Brockelbank v. Sugrue*, 5 C. & P. 21. Where a witness proved the agent's handwriting, and swore that he had often observed him sign policies for the defendant, but had not seen any general power of attorney from the defendant to the agent, nor did he know that the defendant had given any authority to sign the specific policy, nor was he acquainted with any instance in which the defendant had paid a loss upon a policy so subscribed, the proof of agency was held incomplete. *Courteen v. Touse*, 1 Camp. 43.

Parol evidence of statements made by parties at the time of effecting the policy is not admissible for the purpose of controlling its operation. *Weston v. Emes*, 1 Taunt. 115. But the usage of trade will be regarded in the construction of it, and every underwriter is supposed to be acquainted with it. *Noble v. Kennoway*, 2 Doug. 510., and cases cited in *Park on Insurance*, Ch. ii. See *ante*, p. 11. 13, 14.

Interest in the ship, how proved.] The interest in the ship, as stated in the declaration, may be proved, *prima facie*, by evidence of possession of the ship; or of acts of ownership, as directing the loading of the ship, purchasing the stores, paying the people employed, &c. *Amery v. Rogers*, 1 Esp. 207. *Thomas v. Foyle*, 5 Esp. 88. A common mode of proof is to call the captain or master, who will prove that he was appointed and employed by the parties; and though it should appear, on cross-examination, that the plaintiff claims under a bill of sale, it is not, on that account, necessary for him to produce the bill, or the ship's register, unless such further evidence should be rendered

necessary in support of the *prima facie* case of ownership, in consequence of the adduction of contrary proof. *Robertson v. French*, 4 *East*, 137. The certificate of registry is not even *prima facie* evidence of ownership in favour of the plaintiff; for though registration is necessary to complete the title, it is not therefore evidence of it. *Pirie v. Anderson*, 4 *Taunt.* 652. Where the interest is averred in parties who have never been in possession of the ship, it will be necessary to prove the ownership of the persons under whom such parties claim, and the derivative title from them, *viz.* the bill of sale, and the registry of the ship according to the last register act, 3 & 4 *W. 4. c. 55. ss. 31. 34.* As to the proof of registration, and the effect of such proof, see *anté*, pp. 85. 151.

Interest in goods, how proved.] The interest in the goods may be proved, *prima facie*, like the interest in the ship, by evidence of possession and acts of ownership. It is also frequently proved by the production of the bill of lading. A bill of lading directing the delivery of the goods to the consignee is evidence of interest in him; and where made deliverable to the consignor, and indorsed by him either specially or in blank, it is evidence of interest in the indorsee, or holder. *McAndrew v. Bell*, 1 *Esp.* 373. *Lickbarrow v. Mason*, 2 *T. R.* 71. The signature of the deceased master to the bill of lading, as it has the effect of charging himself, is evidence of the interest of the consignee; but not if the master qualifies his acknowledgment by the words "contents unknown." *Haddow v. Parry*, 3 *Taunt.* 303. Nor is the captain's signature evidence, if he is alive. *Semb. Dickson v. Lodge*, 1 *Stark.* 226. Where, to prove property in a cargo by purchase beyond seas, the plaintiff produced a bill of parcels of one Gardener at Petersburg with his receipt to it, and proved his hand, Lee C. J. admitted it as evidence against the insurers. *Russel v. Boheme*, 2 *Str.* 1127. By statute 5 *G. 4. c. 94. s. 2.* any person (after 1st October, 1826) intrusted with, and in possession of, any bill of lading, dock warrant, warrant or order for delivery of goods, &c., shall be deemed and taken to be the true owner of the goods, so as to give validity to any contract for sale of the goods, or any deposit or pledge, provided there be no notice, by the documents themselves, that the person intrusted, as aforesaid, was not the actual owner. An averment that the plaintiffs were interested in the profits arising from the sale of goods which H. and Co. had sold to them, is not satisfied by shewing a void verbal agreement for the sale to the plaintiffs not capable of being enforced against H. and Co. *Stockdale v. Dunlop*, 6 *M. & W.* 224.

Interest, variance in proof of.] A material variance in proof of the alleged interest will be fatal. Thus, where it is averred that the interest is in a single person, and that the policy was made on his account, and for his use and benefit, and it is proved that the interest is in several, and that the policy was made on their joint account, it is a fatal variance. *Bell v. Ansley*, 16 *East*, 141. *Carruthers v. Shedden*, 1 *Marsh.* 416. *S. C.* 6 *Taunt.* 14. But if it be averred that the plaintiff was interested at the time of effecting the policy, it is sufficient to shew that he was interested at the commencement of the risk. *Rhind v. Wilkinson*, 2 *Taunt.* 237. Where a policy averred the interest to be in A. B., who was interested at the time, it is sufficient to prove an

adoption of the policy by A. B. after the loss. *Hagedorn v. Oliverson*, 2 M. & S. 485. By the new rules of pleading, interest may be averred in A. B. C. and D., "or some or one of them." The interest of a ship-owner in the profit expected from carrying his own goods in it, is properly described and insured as *freight*. *Devaux v. J. Anson*, 5 New Ca. 519.

Inception of the risk.] Where the vessel is lost in the course of a voyage for which she is insured, some proof of the inception of the voyage or risk must be given. *Koster v. Innes*, R. & M. 338. This may be proved by some of the crew; or proof of a particular destination by charter-party will afford a presumption that she sailed on the chartered voyage; so proof of her clearing out for a particular port is evidence that she set sail for that port when she dropped from her moorings. Per Lord Ellenborough C. J., *Cohen v. Hinckley*, 2 Camp. 52. *Marsh. Ins.* 715. So proof of a convoy-bond for a particular port, signed by the captain, coupled with the testimony of the custom-house officer that a certificate and other papers for such a voyage would, in the regular course of office, be delivered to the captain before he sailed, together with proof of his sailing, has been held evidence of the ship having sailed on such voyage. *S. C. ibid.* A licence for the port mentioned in the policy is evidence to the same effect. *Marshall v. Parker*, 2 Camp. 69. If the declaration avers that the ship sailed *after* the making of the policy, but in fact it was before, the variance is not material. *Peppin v. Solomons*, 5 T. R. 496. A policy on a ship "at and from" a place, attaches during her stay there before she sails. *Palmer v. Marshall*, 8 Bing. 79. But where the policy is on *freight* "at and from," &c., it attaches only when the ship is at the place in a condition to begin to take in her cargo. *Williamson v. Innes*, *Ibid.* 81. (n). *S. C. 1 M. & Rob.* 88. Where the ship, being in a condition to receive the cargo, was lost by an accident in endeavouring to get her out of dock, and thereby became unable to take the cargo on board, and the policy on freight covered "all perils, losses, and misfortunes," it was held that the risk attached. *Devaux v. J. Anson*, 5 New Ca. 519. It seems that the opinion of brokers and merchants is admissible to shew when the outward bound risk determined, in order to shew when the homeward bound risk commenced. *Camden v. Cowley*, 1 W. Bl. 417.

Shipment of the goods.] The shipment of goods on board is usually proved by the captain; and, if he be dead, the production of the bill of lading and proof of his handwriting will be evidence of the shipping, as well as of the interest. *Haddow v. Parry*, 3 Taunt. 306. The copy of an official paper, made in pursuance of an act of parliament by an officer of the customs, containing an account of the cargo and a report of the goods on board, is evidence to prove the shipping. *Johnson v. Ward*, 6 Esp. 49. See *ante*, p. 146, 147.

In an action upon a policy on freight, the assured must shew that some freight would have been earned, either by proving that some goods were put on board, or that there was some contract for doing so. *Flint v. Fleming*, 1 B. & Ad. 48.

Compliance with warranties.] Where the policy contains a warranty, a literal and strict compliance with it must be proved; it is not suffi-

cient to shew something tantamount to a performance. *Pawson v. Watson*, *Cowp.* 785. ; 2 *Saund.* 200. c. (n) ; *Weir v. Aberdeen*, 2 *B. & A.* 320. To satisfy a warranty "to depart" on or before a particular day, the vessel must be out of port on or before that day ; a warranty "to sail" is satisfied by the ship breaking ground and getting under weigh. *Moir v. Roy. Ex. Ass. Co.*, 3 *M. & S.* 461. *S. C.* 6 *Taunt.* 241. ; and see *Lang v. Anderdon*, 3 *B. & C.* 495. But unless she is unmoored, the warranty to sail is not complied with. *Nelson v. Salvador*, *M. & M.* 309. Sailing before the vessel has got her clearances and is equipped for the voyage, is not a sailing within the warranty. *Ridsdale v. Newnham*, 3 *M. & S.* 456. It is not satisfied by the ship leaving the harbour on the day without a sufficient crew on board, though the remainder of the crew are engaged and ready to sail. *Graham v. Barras*, 5 *B. & Ad.* 1011. Where a vessel sailed from St. Anne's, Jamaica, within the time of warranty, with her cargo and clearances on board, and called at another port in Jamaica for convoy, where she was detained by an embargo till after the time of warranty, it was held that this was a sufficient sailing from Jamaica. *Bond v. Nutt*, *Cowp.* 601. ; *Theilussou v. Fergusson*, 1 *Doug.* 361. A warranty to sail on a certain voyage not after a certain day, it is complied with by getting out of the dock, and endeavouring to leave the harbour in the prosecution of the voyage. It might be otherwise, if the warranty were to sail from some particular terminus. *Cockrane v. Fisher*, 1 *C. M. & R.* 809.

To prove the sailing with convoy, the log-book, or the official letter of the commander of the convoy is evidence. *D'Iraclé v. Jowett*, 1 *Exp.* 427. ; *Watson v. King*, 4 *Camp.* 275. ; *anté*, p. 147.

On a policy on goods, in order to prove a warranty that the ship insured was a Danish ship, proof of her carrying the flag of that nation at times when she was free from the danger of capture, and that the captain addressed himself to the consul of that nation in a foreign port, was held *prima facie* evidence. *Arcangelo v. Thompson*, 2 *Camp.* 689. Under a warranty of neutrality it is sufficient to shew that the ship was neutral when the risk commenced. *Eden v. Parkison*, 2 *Doug.* 732.

There are also certain implied warranties, the breach of which will prevent the plaintiff from recovering ; as that the vessel is seaworthy ; but it is sufficient if she is seaworthy at the time of sailing. *Annen v. Woodman*, 3 *Taunt.* 299. *Primâ facie* a ship is to be deemed seaworthy ; *Parker v. Potts*, 3 *Dow, Parl. C.* 31. ; but where the inability of the ship to perform the voyage becomes evident in a short time from the commencement of the risk, the presumption is that it arises from causes existing before her setting sail on the intended voyage, and that the ship was not then seaworthy ; and the *onus probandi*, in such case, rests with the assured to shew that the inability arose from causes subsequent to the commencement of the voyage. Per Lord Eldon, *Watson v. Clark*, 1 *Dow, Parl. C.* 344. ; see also *Douglas v. Scougall*, 4 *Dow, Parl. C.* 269. The insured are not entitled to recover unless they equip the ship with every thing necessary to her navigation during the voyage. *Law v. Hollingsworth*, 7 *T. R.* 161. A ship is not fit for a voyage unless she sails with a complete crew ; a crew competent for the voyage, considering its length and the circumstances under which it is undertaken. Therefore where, on a voyage from Mauritius to London, there was no one on board competent to supply the captain's place in case of illness,

the underwriters were held to be discharged. *Clifford v. Hunter, M. & M.* 103. But where the assured has once provided a sufficient crew, the negligence of the crew at the time of the loss is no breach of the implied warranty. *Busk v. Roy. Ex. Ass. Co., 2 B. & A.* 73. There is no implied warranty, on the part of the owner of goods insured, that the ship shall be in all respects properly documented: therefore, where the captain neglected to mention the goods in the ship's manifest, as required by 13 & 14 Car. 2. c. 11. &c., this was held no defence against the owner of the goods. *Carruthers v. Gray, 3 Camp.* 142. Where a question arises as to the seaworthiness of a ship, ship-builders, though they have never seen the ship, may state their opinion on examining a survey taken by others; it being a matter of skill and science, *Beckwith v. Sydebotham, 1 Camp.* 117. *Thornton v. Roy. Ex. Ass. Co., Peake, 26.* See *antè*, p. 131. As to the effect of a sentence of a foreign court of admiralty in negating a warranty of neutrality, see *antè*, p. 144, 145.

A memorandum, written on a separate piece of paper, and inclosed in the policy, cannot be considered a warranty. *Pawson v. Barnevelt, 1 Doug.* 12 (s). But it is immaterial whether the warranty is on the margin, or in the body of the policy. *Bean v. Stupart, 1 Doug.* 11. *De Hahn v. Hartley, 1 T. R.* 343. A warranty may be waived by a memorandum on the policy without a stamp. *Hubbard v. Jackson, 4 Taunt.* 174. *Weir v. Aberdeen, 2 B. & A.* 325.; *antè*, p. 169.

Licence.] Where the voyage has been legalised by a licence, such licence must be produced and proved, unless lost, when parol evidence of its contents is admissible. *Kensington v. Inglis, 8 East,* 273. But where a licence was granted by the secretary of state in this country, pursuant to 48 G. 3. c. 126., parol evidence was excluded on the ground that there must have been some register of it preserved in the office of the secretary of state, which would be better than parol evidence. *Rhind v. Wilkinson, 2 Taunt.* 237. By the above-mentioned statute a duplicate of the order in council, authorizing the grant of the licence, is to be annexed to it; if therefore the licence is lost, examined copies of the order in council from the council books, and of the licence in the office of the secretary of state, must be produced, as the best secondary evidence; and it must be proved that the licence put on board the ship is lost. *Eyre v. Palgrave, 2 Camp.* 606. Proof that a vessel, warranted to carry a French licence, remained at Bordeaux a month after the inspection of the document purporting to be a French licence, and of other documents, by the officers of the French government, is *prima facie* evidence that the document is genuine. *Everth v. Tunno, 1 Stark.* 606. The licence must be shewn to apply to the voyage in question. *Barlow v. McIntosh, 12 East,* 311. On proof that goods, which cannot be exported without a licence, were duly entered for exportation at the custom-house, it will be presumed, as against insurers, that there was a licence to export them. *Van Omern v. Dowick, 2 Camp.* 43.

Proof of loss by the perils of the sea.] The loss, if traversed, must be proved to have happened as stated in the declaration; therefore, where goods were insured at and from M. to L., and the declaration averred that, after the loading of the goods, the ship departed on her intended voyage, and, while in the course of her said voyage, was lost by the

perils of the seas, it was held that this allegation was not supported by proof that the ship was lost *at her moorings*, and before the cargo was completed. *Abibol v. Bristow*, 2 Marsh. 157. S. C. 6 Taunt. 464.

A loss, occasioned by running foul of another vessel by misfortune, is a loss by the perils of the seas. *Buller v. Fisher*, 3 Esp. 67. So if she was run down by another ship through gross negligence. *Smith v. Scott*, 4 Taunt. 126. So where the vessel is wrecked in consequence of the barratry of the master. *Heyman v. Parish*, 2 Camp. 149. Where a portion of the goods was saved from the wreck and got on shore, but never came to the hands of the owners, Gibbs C. J. held it a total loss by the perils of the seas. *Bondrett v. Hentigg, Holt*, N. P. C. 149. So in an insurance on goods, where the ship was stranded within a few miles of the port of destination, disabled from proceeding, and lost, but, while she lay in the sand, was seized by the commander of the place at which she was stranded and the goods confiscated by him, it was held that the goods were lost by the perils of the seas. *Hahn v. Corbett*, 2 Bing. 205. Where the insurance was on living cattle warranted free from mortality, which in the course of the voyage were killed by the rolling of the ship, it was held a loss by the perils of the seas. *Laurence v. Aberdeen*, 5 B. & A. 109.; *Gabay v. Lloyd*, 3 B. & C. 793. A government transport had been insured for twelve months, during which she was ordered into a dry harbour the bed of which was uneven, and, the tide having left her, she received damage by taking ground; this was held to be a loss by perils of the seas. *Fletcher v. Inglis*, 2 B. & A. 315. But where a ship was hove down upon a beach, within the tideway, to repair, and, the tide rising, she was bilged and damaged; it was held not to be a loss occasioned by the perils of the seas; *Thompson v. Whitmore*, 3 Taunt. 227.; and see *Phillips v. Barber*, 5 B. & A. 161. Where the ship is so injured by worms at sea as to be unable to proceed and condemned as irreparable, this is not a loss by perils of the seas; *Rohl v. Parr*, 1 Esp. 445.; nor where one English ship sinks another by firing on her, supposing her an enemy. *Cullen v. Butler*, 5 M. & S. 461. Where two ships were injured by collision, and the owners of one were, in consequence, compelled by a foreign court of admiralty to pay damages, held that this was not a loss by peril of the seas; nor could they recover the extra expense of maintaining the crew whilst the ship was under repair. *De Vaux v. Salvador*, 4 A. & E. 420.

A loss by perils of the seas, but remotely occasioned by the negligence of the crew, is within the policy. *Walker v. Maitland*, 5 B. & A. 171.; and see *Bishop v. Pentland*, 7 B. & C. 219.; *Shore v. Bentall*, 7 B. & C. 798 (n). So where occasioned by the mistake of the master, provided he was a person of competent skill at the time when the policy was effected. *Phillips v. Headlam*, 2 B. & Ad. 380.

Where a ship was disabled by perils of the seas from pursuing her voyage, and the master, to defray the expense of repairs, having no other means of drawing money, sold part of the goods insured, and applied the proceeds towards the repairs, it was held that this was not a loss of the goods by perils of the seas. *Sarguy v. Hobson*, 2 B. & C. 7. S. C. 4 Bing. 131., 1 Y. & J. 347. A ship was wrecked, sunk, and sold by the owner and master after a survey by captains approved by the agent of Lloyd's. Two days afterwards she was got clear off by the purchaser and repaired, but at great expense. She might, after the

repairs, have returned to England in ballast, or with certain kinds of cargo. Lord Tenterden said, that not only must the owner act honestly in the sale, but the underwriters were not liable, unless he formed the best and soundest judgment that could be formed under the circumstances: if the ship could have been brought to England, even in ballast, so as to have repaid the money expended in repairs, they ought to have been made by the captain: the loss of a voyage would not make a constructive total loss of the ship. He left it to the jury to say, whether the captain exercised a sound judgment as well for the benefit of the underwriters as for all parties. *Doyle v. Dallas*, 1 M. & Rob. 48. Under circumstances very similar to the above, where the ship was sold for 18*l.*, got off by the purchaser in five days, and repaired at an expense of 750*l.*, and was then worth 1200*l.*; Bayley B. said, "If the situation of the ship be such, that by no means within the master's reach it can be treated so as to retain the character of a ship, then it is a total loss. If the captain, by means within his reach, can make an experiment to save it with a fair hope of restoring it to the character of a ship, he cannot, by selling it, turn it into a total loss. If she be in a situation such that, by means which the captain could reasonably use, she could not be brought to retain the character of a ship, it is a total loss. *Bona fides* in the captain will not decide the question, for if he sells erroneously what is entitled to the character of a ship, though he thinks it a wreck, it will not do." *Gardner v. Salvador*, 1 M. & Rob. 116.

A ship never heard of is presumed to have foundered at sea. *Green v. Brown*, 2 Stra. 1199. *Newby v. Reed*, Park's Ins. 85., 6th ed. In order to recover in such case, the plaintiff must prove that the vessel sailed on the voyage insured. *Cohen v. Hinckley*, 2 Camp. 51. *Koster v. Innes*, R. & M. 333. It is sufficient to prove that the ship has not been heard of in this country since the time of her sailing, without calling witnesses from the port of destination, to prove that she never arrived there. *Twemlow v. Orwin*, 2 Camp. 85. The time within which a missing ship will be presumed lost must be regulated by the circumstances of the case. In *Houstman v. Thornton*, Holt, N. P. C. 242., a ship which had sailed on a seven weeks' voyage, and had not been heard of for eight or nine months, was presumed to be lost. Where it was proved that the vessel sailed on the voyage insured with the goods on board, and never arrived at her port of destination, and that a few days after her departure a report was heard at the place whence she sailed that she had foundered at sea, but that the crew were saved, it was held that this was sufficient *prima facie* evidence of a loss by the perils of the seas, and that the plaintiff was not bound to call any of the crew, or to show that he was unable to procure their attendance. *Koster v. Reed*, 6 B. & C. 19.

[Proof of loss by fire.] Proof that the ship was burned to prevent her falling in the hands of the enemy, is evidence of a loss by fire. *Gordon v. Rimmington*, 1 Camp. 123. So in an insurance "against fire, barratry, &c.," proof that the ship was burned by the negligence of the master and mariners will support a statement of loss by fire. *Busk v. Royal Ex. Ass. Co.* 2 B. & A. 73. But in an insurance on goods, if the goods are burnt in consequence of being put on board in bad condition, this,

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being occasioned by the insurer's own act, is not a loss by fire within the meaning of the policy. *Boyd v. Dubois*, 3 Camp. 133.

Proof of loss by capture.] Where a vessel is driven by a gale of wind on an enemy's coast, and there captured, it is a loss by capture. *Green v. Elmalie, Peake*, 212. The books at Lloyd's have been received as evidence of a capture; but not of notice of the loss to the underwriter. *Abel v. Poits*, 3 Esp. 242.; *anté*, p. 147. A foreign sentence of condemnation is not evidence of a capture; but after other proof of a capture it is evidence to show the grounds of condemnation. *Marshall v. Parker*, 2 Camp. 69.; see *anté*, pp. 142. 144. If a ship after capture is restored so as to be in a condition to pursue the voyage insured, and is afterwards lost on another voyage, the plaintiff cannot recover on a declaration for a loss by capture. *Kulen Kemp v. Vigne*, 1 T. R. 304. Proof of a capture by collusion with the captain will support an averment of loss either by capture or barratry. *Arcangelo v. Thompson*, 2 Camp. 621.

Proof of loss by barratry.] Barratry is a fraud committed by master or mariners against the owner; therefore the act of the owner is not barratry. Evidence that the person, who acted as master of the ship, carried her out of her course for fraudulent purposes of his own, is *prima facie* evidence of barratry without negative proof that the person so acting as master was not the owner. *Ross v. Hunter*, 4 T. R. 33. Where, however, the whole ship is let, the freighter is owner *pro hac vice*, and barratry may be committed even with the consent of the general owner. *Vallejo v. Wheeler, Cowp.* 143. *Soares v. Thornton*, 7 Taunt. 627. Smuggling by the captain, on his own account, will be evidence of barratry; *Lockyer v. Offley*, 1 T. R. 252.; but if, by the gross negligence of the owner, the mariners barratrously carry smuggled goods on board, the underwriters are not liable. *Pipon v. Cope*, 1 Camp. 434. Proof that prisoners of war rose and confined all the crew and put them on shore except one, who was heard on the deck in conversation with them, is evidence of barratry. *Hucks v. Thornton, Holt*, N. P. C. 30.

Proof of stranding.] Where goods are insured free from average unless general, or the ship should be stranded, before the plaintiff can recover for a partial loss, the *stranding* must be proved. A *striking* is not sufficient; it is merely temporary, or, as it has been vulgarly described, "a touch and go;" in order to constitute a stranding, the ship must be stationary. *McDougle v. Royal Ex. Ass. Co.*, 4 Camp. 283., *S. C.* 4 M. & S. 503. But where the ship was fixed from fifteen to twenty minutes, it was held a stranding. *Baker v. Towry*, 1 Stark. 436. If a ship is forced ashore, or is driven on a bank, and remains for any time on the ground, this is a stranding, without reference to the degree of damage she sustains. *Harman v. Vaux*, 3 Camp. 431. The stranding must be of the *ship* itself; the stranding of a lighter conveying goods from the ship to the shore will not make the insurer liable. *Hoffman v. Marshall*, 2 New Ca. 383. "A stranding," says Mr. Justice Bayley, "may be said to take place where a ship takes the ground, not in the ordinary course of the navigation, but by reason of some unforeseen accident." *Bishop v. Pentland*, 7 B. & C. 224.

Where a ship, under the conduct of a pilot in her course up the river to Liverpool, was, against the advice of the master, fastened at the pier of the dock basin by a rope to the shore, and left there, and took the ground and, when the tide left her, fell over on her side and bilged; this was held to be a stranding. *Carruthers v. Sydebotham*, 4 M. & S. 77. So where, in the course of a voyage upon an inland navigation, it became necessary, in order to repair the navigation, to draw off the water, and the ship in consequence, having been placed in the most secure situation that could be found, when the water was drawn off went by accident upon some piles, which were not previously known to be there, it was held a stranding. *Rayner v. Godmond*, 5 B. & A. 225. So where, in the course of the voyage, the ship was by tempestuous weather forced to take shelter in a harbour, and on entering it struck upon an anchor, and being brought to her moorings was found leaky and in danger of sinking, and on that account was hauled with warps higher up the harbour, where she took the ground and remained fast for half an hour, the stranding was held to be proved. *Barrow v. Bell*, 4 B. & C. 736. A ship was compelled in the course of her voyage to put into a tide harbour, and was there moored alongside a quay in the usual place for such ships. It became necessary, in addition to the usual moorings, to fasten her by tackle to posts on the shore, to prevent her falling over, upon the tide leaving her. The rope with which she was fastened, not being of sufficient length, broke when the tide left the vessel, and she fell over upon her side, and was thereby greatly injured; this was held to be a stranding, though it might have been occasioned remotely by the negligence of the crew. Mr. Justice Bayley said, "So long as the vessel was on the ground, and lashed to the posts on shore, she was not stranded; but, when she fell over on her side, and lay on the ground in that position, she was stranded. The falling over was not in the ordinary course of the voyage, but in consequence of an unforeseen accident out of the ordinary course of the voyage, viz. the breaking of the rope." *Bishop v. Pentland*, 7 B. & C. 219.

But where the taking the ground is in the ordinary course of the navigation, and no more than is usual with the vessels on the same voyage, it is not a stranding; thus, where a vessel took the ground in the ordinary course of the navigation, and afterwards, being moored at a quay, on the ebb of the tide took the ground, fell over on her side, and was injured, but the taking of the ground was stated by a witness to be no more than was usual with vessels of the same class in proceeding up the same navigation, this was held not to be stranding. *Hearne v. Edmunds*, 1 B. & B. 388. "Where a vessel," says Lord Tenterden, "takes the ground in the ordinary and usual course of navigation and management in a tide river or harbour, upon the ebbing of the tide or from natural deficiency of water, so that she may float again upon the flow of tide or increase of water, such an event shall not be considered as a stranding within the sense of the memorandum. But where the ground is taken under any extraordinary circumstances of time or place, by reason of some unusual or accidental occurrence, such an event shall be considered as a stranding within the meaning of the memorandum." *Wells v. Hopwood*, 3 B. & Ad. 34. And where upon the ebbing of the tide a vessel took the ground, in a tide harbour, in the place where it was intended she should, but in so doing struck against some hard substance by which two holes were made in her

bottom, this was held to be no stranding. *Kingsford v. Marshall*, 8 Bingh. 458.

In order to bring the case within the *stranding* mentioned in the memorandum as to partial loss, it must appear that the goods were on board at the time; thus where hides grew putrified, and were sold in the course of the voyage at an intermediate port, and the ship was afterwards stranded, it was held that this was not a performance of the condition in the memorandum. *Roux v. Salvador*, 1 New Ca. 526.

Proof of amount of loss.] Where the plaintiff declares for a total, he may give evidence of a partial, loss. *Gardiner v. Crosedale*, 1 W. Bl. 198. *Rucker v. Palsgrave*, 1 Camp. 557. S. C. 1 Taunt. 419. An adjustment is proved by evidence of the signature of the underwriter, or his agent, with proof of the authority of the latter; and it seems that an agent, who has authority to subscribe a policy, has also authority to sign an adjustment of the loss. *Richardson v. Anderson*, 1 Camp. 43 (n). An adjustment is only *prima facie* evidence against the underwriter, and does not bind him, unless there was a full disclosure of the circumstances of the case; *Shepherd v. Chewter*, 1 Camp. 274.; and fraud opens an adjustment; *Christian v. Coombe*, 2 Esp. 489. An adjustment does not require a stamp; *Wiebe v. Simpson*, 2 Selw. N. P. 917., 4th ed. In an action on insurance of goods, if the declaration allege the ship to have been sunk, whereby the goods were spoiled, and it appears that some of the goods were saved, the plaintiff may give the expense of salvage in evidence, though not specially averred; *Cary v. King*, Rep. temp. Hardw. 304. Salvage on the re-capture of a ship must be proved by producing the proceedings of the Admiralty court ascertaining the amount. *Thellusson v. Shedden*, 2 N. R. 229. In open policies the assured must prove the extent of his loss; but in valued policies, if the loss be a total one, he is only bound to prove *some* interest in the ship or goods in order to take the case out of the statute 19 G. 2. c. 37.; for, ever since that statute, the constant usage has been to permit the valuation fixed in the policy to stand, unless the defendant can show that the plaintiff had a colourable interest only, or that he has greatly overvalued the goods. But where the loss is partial, it opens a valued policy; and the plaintiff is as much bound to prove the value of the goods that have been lost, and to ascertain the damage he has sustained by the loss, as in case of an open policy. 2 Saund. 201 (n).

The certificate of an agent of Lloyd's, resident abroad, is not admissible to prove the amount of damage sustained by goods, though the defendant is a subscriber to Lloyd's. *Drake v. Marryat*, 1 B & C. 473.

Where the underwriter is entitled to a deduction in respect of an old ship being made as good as new by the repairs, it is a question for the opinion of merchants, and not of underwriters only, whether the ship be a new one on its first voyage, so as to disentitle the defendant to such deduction. *Pirie v. Steele*, 2 M. & Rob. 49. Where each package is separately insured, there may be a total loss of each; but where the whole is insured upon the bulk, there cannot be a total loss of part so as to enable the insurers to claim notwithstanding the clause against particular average; *Hills v. London Ins. Corp.* 5 M. & W. 569. In considering whether the loss of a ship is partial or total, the jury ought not to take into account the estimated value as stated in the

policy; but they may look into all the circumstances of the case, as the national character of the ship, &c., to ascertain its value when repaired, so as to judge whether a prudent owner ought to have repaired it. *Young v. Turing*, 2 M. & G. 593.

Proof of amount of loss—abandonment.] Before the plaintiff can recover for a total loss, it is necessary in some cases to prove an abandonment. "The late cases show that a mere loss of the adventure by retardation of the voyage, without loss of the thing insured either by its being actually taken from the ship or spoiled, does not constitute a total loss, under a policy of insurance, unless by the aid and effect of abandonment." *Per* Lord Tenterden C.J., *Naylor v. Taylor*, 9 B. & C. 723. In order to justify an abandonment, there must have been *that* in the course of the voyage which, at the time, constituted a total loss; thus; capture or the necessary desertion of a ship, constitutes a total loss. *Per* Bayley J., *Holdsworth v. Wisc*, 7 B. & C. 799. The effect of an abandonment, therefore, is to prevent a loss, at the time total, from becoming by the operation of subsequent circumstances, partial. It is a general rule in the law of insurance, that, in order to recover for a *constructive* total loss, the assured must first abandon; and it makes no difference, that what has been saved has been sold, and the money paid over to the agent of the assured before any notice of the loss. *Roux v. Salvador*, 1 New Ca. 539. But where a cargo of hides, in consequence of a leak, began to putrify, and were sold at an intermediate port for less than a fourth of their value, and it appeared that, if they had proceeded, they could not have arrived at the end of the voyage *as hides*, it was held to be a total loss without an abandonment; *S. C.* 3 New Ca. 266. (reversing a contrary decision in the same case in C.P.); where the law respecting the necessity of abandonment is fully explained.

Where, in a valued policy, the risk on the goods was to commence twenty-four hours after her arrival at the coast of Africa (where she was to load), a considerable part of the cargo not being shipped at the time of a total loss, and the part shipped not being equal to the value put upon the goods in the policy, it was held that the valuation was opened, and that the assured was only entitled to recover a proportion estimated on the part of the cargo shipped at the time of the loss. *Rickman v. Carstairs*, 5 B. & Ad. 651. On a policy on freight, the ship having actually carried full freight though not that intended for her, the assured cannot recover for the delay and expense as a partial loss. *Brocklebank v. Sugrue*, 1 M. & Rob. 102.

An abandonment may be by parol; but it should be certain; and therefore a statement of the facts, a request to settle for a total loss, and to direct the disposal of the ship, have been held insufficient. *Parmeter v. Todhunter*, 1 Camp. 541. The notice of abandonment must be given within a reasonable time. *Read v. Bonham*, 3 B. & B. 147. So the underwriter is bound to say within a reasonable time after receiving notice of abandonment, whether he will accept it or not. *Hudson v. Harrison*, 3 B. & B. 97. A party, jointly interested in the subject matter of the insurance and who has effected the insurance, may give notice of abandonment for all. *Hunt v. The Royal Ex. Assur.* 5 M. & S. 47.

Defence.

Under the general issue the defendant cannot, since the new rules, show that the plaintiff is not entitled to recover on account of fraud, or misrepresentation, or concealment of circumstances, or non-compliance with representations, or non-compliance with a warranty; but such defences must be specially pleaded, the new rules declaring that the plea of non-assumpsit shall operate as a denial only of the subscription to the alleged policy by the defendant, but not of the interest, or the commencement of the risk, of the loss, or of the alleged compliance with warranties. A subsequent rule declares that misrepresentation, deviation, and concealment, must be pleaded. See the *Rules*, *post*, *Appendix*, No. I.

Fraud, misrepresentation, or concealment.] If the assured conceals any material fact which relates to the ship, the policy is void. *Carter v. Boehm*, 3 Burr. 1905. And the assured is bound to communicate all the information he has received, though he does not know it to be true, and it afterwards turns out to be false. *Lynch v. Hamilton*, 3 Taunt. 37. It is sufficient to communicate facts, without the opinion or conclusion founded upon those facts. *Bell v. Bell*, 2 Camp. 475.; *Durrell v. Bederley*, Holt, 283. Underwriters have been sometimes called to state their opinion as to whether the communication would have varied the terms of insurance. *Berthon v. Loughman*, 2 Stark. 258. And in an action for not procuring a policy of insurance to be altered, it was held that an insurance-broker might be asked, upon inspection of the policy, the invoices, and a letter from the supercargo stating the circumstances and situation of the ship, what alterations a skilful broker ought to have made. *Chapman v. Walton*, 10 Bing. 57. But see the cases cited, *ante*, p. 130, 131. And it seems it is a question for the jury whether any particular fact is or is not material. *Lindenau v. Desborough*, 8 B. & C. 586. *Westbury v. Aberdeen*, 2 M. & W. 267. It is sufficient if a representation be substantially performed, and not, like a warranty, strictly and literally. *Pauson v. Watson*, Comper, 786. And it has been ruled by Lord Tenterden, that the mere fact of a misrepresentation, without fraud, will not be enough to prevent the plaintiff's recovery; for the contract between the parties is in writing, and cannot be varied by parol. *Flinn v. Tobin*, M. & M. 367.

In an action against a second or subsequent underwriter, it is the practice to admit evidence of representations to the first underwriter, on a presumption that the subsequent underwriters give credit to them. *Marsden v. Reid*, 3 East, 573. *Stackpole v. Simon*, Park's Ins. 583., 8th ed. The rule is confined to representations made to the first underwriter, that is, the first on the policy; *Ibid.* *Bell v. Carrstairs*, 2 Camp. 543.; and is to be taken with great qualifications, both with regard to the time and circumstances under which the communication was made. *Forrester v. Pigou*, 1 M. & S. 9.

Fraud.] If goods are over-valued with intent to defraud the underwriters, the contract is void, and the assured cannot recover even for the value actually on board. *Haigh v. De la Cour*, 3 Camp. 319.

Deviation.] A deviation from the voyage insured is a defence to an action on the policy. Where the insurance is on a voyage to a given place, and the captain, when he sails, does not mean to go to that place at all, he never sails on the voyage insured. But where the ultimate termini of the intended voyage are the same as those described in the policy, although an intermediate voyage be contemplated, the voyage is to be considered the same until the vessel arrives at the dividing point of the two voyages: the departure from the course of the voyage insured then becomes a deviation; but, before the arrival at the dividing point, there is no more than an intention to deviate, which alone will not vitiate the policy. *Hare v. Travis*, 7 B. & C. 17. Whether a deviation for the purpose of assisting a vessel in distress is a forfeiture of the policy does not appear to be settled. The Court of Admiralty has expressed a doubt whether it is a forfeiture; and the American courts have held that it is not. *The Jane*, 2 Hagg. Adm. Rep. 345. 3 *Ken's Commentaries*, 16.

An unreasonable and unjustifiable delay on the part of the insured, before the risk attaches, in commencing the voyage insured against, is in the nature of a deviation, and amounts to such an alteration of the risk as to discharge the underwriters. *Mount v. Larkins*, 8 Bing. 108. Unreasonable delay is properly a question for the jury. *Palmer v. Marshall*, 8 Bing. 318. *Hamilton v. Sheddon*, 3 M. & W. 49.

Non-compliance with warranties.] The defendant may defeat the plaintiff's claim by pleading and showing a non-compliance with a warranty, either express or implied. See *anté*, p. 237—239.

As to the want of proper stamp, and an alteration in the policy, see *anté*, p. 169.

Payment.] The defendant may show, under a special plea, a custom that credit taken between the insurance broker and underwriter should be taken as payment by the defendant after the amount has been adjusted between defendant and such broker. *Stewart v. Aberdeen*, 4 M. & W. 211. An adjustment indorsed on the policy, with the defendant's name struck out of it, is not evidence for the defendant that the amount, so adjusted, has been paid. *Adams v. Sanders*, M. & M. 373.

Competency of Witnesses.

An underwriter is a competent witness for another underwriter, who has subscribed the same policy; *Bent v. Baker*, 3 T. R. 27.; unless he has entered into the consolidation rule, or has paid the loss upon an agreement to be re-paid in case the plaintiff fails. *Forrester v. Pigou*, 1 M. & S. 9. In an action on insurance of goods, the owner of the vessel was held incompetent to prove the seaworthiness of the ship; for he would be liable to the plaintiff, if unseaworthy. *Rotheroe v. Elton, Peake*, 84. So the captain has been held not a competent witness for the defendant to disprove the charge of barratry. *Bird v. Thompson*, 1 Esp. 339. These cases, however, were decided before 3 & 4 W. 4. c. 42. which see *anté*, p. 111. One who is jointly interested in the property, whether at the time of effecting the policy (*De Symonds v. Shedden*, 2 B. & P. 155.) or afterwards (*Perchard v.*

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Whitmore, Ibid. (n) was also held incompetent for the plaintiff, before the above statute. The captain's protest is not admissible evidence against the defendant of the facts there stated; but may be read for the purpose of contradicting his (the captain's) testimony. *Senat v. Porter*, 7 T. R. 158. *Christian v. Coombe*, 2 Esp. 490.

ASSUMPSIT ON POLICIES ON LIVES.

Many of the cases on marine policies apply equally to policies on lives and against fire; and in both cases the pleadings now sufficiently point out the nature of the required evidence.

Interest.] The interest which the insurer is required to have in the life of the assured, under 14 G. 3. c. 48. s. 1., must be a pecuniary interest. *Halford v. Kymer*, 10 B. & C. 724. But an interest may be sometimes presumed; as where a wife insures her husband's life. *Reed v. Royal Ex. As. Company*, 2 Peake, 70. The plaintiff who insures the life of another, or any other event, can recover no greater sum than the amount or value of his interest in such life or event; stat. 14 G. 3. c. 48. s. 3.

Misrepresentation.] The party whose life is the subject of insurance is so far an agent for the assured, that he is bound to answer truly questions put to him by the insurer; but a policy is not avoided by his omission to communicate material facts, unless he knew them to be so and fraudulently concealed them. *Rawlins v. Desborough*, 2 M. & Rob. 328., and note, *ibid.* The materiality is a question for the jury. *S. C.*

ASSUMPSIT ON A WARRANTY.

When a horse has been sold, and warranted sound, but is in fact unsound, the purchaser may maintain an action upon the warranty, or, in some cases, may rescind the contract and recover the money paid under the count for money had and received. Thus, where by the contract the purchaser has the power of returning the horse if unsound, and does return it or offer to do so, the contract is at an end, and money had and received will lie. *Towers v. Barrett*, 1 T. R. 133. So, where the contract is rescinded with the assent of the defendant. *Per Buller J., ib.* But the purchaser must return the horse within a reasonable time; *Dr. Compton's case*, cited 1 T. R. 138.; *Adam v. Richards*, 2 H. Bl. 574.; and in the state as sold, not diminished in value by doctoring &c.; *Curtis v. Hannay*, 3 Esp. 82. Where a horse was warranted sound, and the vendor said in a subsequent conversation that, if the horse were unsound he would take it again and return the money, it was held that the original contract was not abandoned, and that assumpsit for money had and received could not be maintained by the purchaser; the horse not being actually taken back. *Payne v. Whale*, 7 East, 274. It is only where there is a condition in the contract authorising the return, or the vendor has received back the horse and has thereby actually rescinded the contract, or has

been guilty of a fraud which destroys the contract altogether, that the purchaser may recover back the price. *Street v. Blay*, 2 B. & Ad. 462. *Gompertz v. Denton*, 1 C. & M. 207. *Edwards v. Chapman*, 1 M. & W. 231.

If the plaintiff sues for money had and received, he must prove the purchase, the warranty, and breach of it, and the power to rescind, or actual rescission by consent.

Where the plaintiff proceeds on the contract of warranty, he may be put, by a plea of non-assumpsit, to prove the contract, viz. the consideration and the promise; and, by a traverse of the breach, the unsoundness or other breach alleged. Where there was a warranty, it was held that, though the plaintiff discovered the unsoundness shortly after the purchase and gave no notice of it, but kept the horse nine months and endeavoured to cure it, he was still entitled to recover. *Pateshall v. Tranter*, 3 A. & E. 103.

The consideration.] This is usually proved by the production of the receipt. If the defendant took another horse in part payment, it is no variance to state that the whole price was paid in money, provided the contract was, in substance, one of sale and not of exchange. *Hands v. Burton*, 9 East, 349. *Brown v. Fry*, Selw. N. P. 630. But see *Harris v. Fowle*, cited 1 H. Bl. 287. If an agent sell to A., by one entire contract, two horses belonging to B. and C., and warrant them, it is a variance to declare against the agent as on a sale of one horse, although one only is unsound. *Symonds v. Carr*, 1 Camp. 361. Where the declaration stated the contract to be that, in consideration the plaintiff would buy of the defendant a horse for a certain price, to wit 55*l.*, the defendant undertook that the horse was sound; and the contract proved was that the defendant warranted the horse sound and agreed to give 1*l.* back if the horse did not bring the plaintiff 4*l.* or 5*l.*, this was held a variance. *Blyth v. Bampton*, 3 Bing. 472. Where the consideration was stated to be 63*l.*, but the evidence was that plaintiff would pay that sum, and "if the horse was lucky would give the defendant 5*l.*" &c., it was held no variance; for the latter words were too vague to form part of the consideration. *Guthing v. Lynn*, 2 B. & Ad. 232.

The promise or warranty.] The plaintiff must prove an express warranty; a high price not being tantamount thereto. *Parkinson v. Lee*, 2 East, 322. An admission of the plaintiff is sufficient proof. Thus, where the plaintiff wrote to the defendant, "You will remember that you warranted a horse as a five-year old," &c., to which the defendant answered, "The horse is as I represented it," it was ruled that this was evidence of a warranty at the time of sale. *Salmon v. Ward*, 2 C. & P. 211. The seller of some pictures gave, at the time of sale, the following bill of parcels, "Four pictures, views in Venice, Canaletti, 160*l.*:" The judge left it to the jury on this and the rest of the evidence, whether the defendant had contracted that the pictures were those of the artist named, or whether his name was used merely as matter of description or intimation of opinion: The jury found a contract of warranty, and the Court of King's Bench held that the question had been properly left to them. *Power v. Barham*, 4 A. & E. 473. If the seller says, "The horse is sound to the best of my knowledge, but I will not warrant it," and the seller knows it to be unsound, he is an-

averable on this qualified warranty. *S. C. Wood v. Smith, M. & M. 539.* Where the warranty was, "To be sold, a black gelding five years old — has been constantly driven in the plough — warranted," — this was held to be only a warranty of soundness. *Richardson v. Brown, 1 Bing. 344. S. C. 8 B. Moore, 336.* So, "received of B. 10l. for a grey four-year old colt, warranted sound," is not a warranty of age. *Budd v. Fairmaner, 8 Bing. 48.* Where there is a manifest defect to which the attention of the parties is called at the time of the bargain, a general warranty of soundness will not be deemed to extend to it. *Margetson v. Wright, 7 Bing. 603.* A splint has been held not to be such a manifest defect. *Margetson v. Wright, 8 Bing. 454.* Where a horse is sold by private sale at a repository for the sale of horses, where the terms of the sale of horses are painted upon a board fixed up in a conspicuous situation, a purchaser must be taken to be cognizant of those terms, though nothing is said respecting them at the time of sale; and if one of the terms is, that the horse, being found to be unsound, must be returned within twenty-four hours, it must be complied with, though the unsoundness is of such a nature as may not be discovered within that time. *Bywater v. Richardson, 1 A. & E. 508.* Where an article is sold for a particular purpose, as a rope to lift goods by a crane, there is an implied warranty that it is reasonably fit for such purpose; and the vendor is liable on such warranty, though he was not the maker of the rope. *Brown v. Edgington, 2 M. & G. 279.*

A servant employed to sell a horse has an implied authority to warrant; *Alexander v. Gibson, 2 Camp. 555.*; and even where the servant have express directions not to warrant, but does warrant, the master is said to be bound, unless he has notified to the world that the general authority is circumscribed. *Pickering v. Busk, 15 East, 45. Helyear v. Hawke, 5 Esp. 75.* But the doctrine has, according to some authorities, been confined to the case of sales by servants of horse dealers, who may be supposed to possess a general authority. *Bank of Scotland v. Watson, 1 Dow. Parl. C. 45. Fenn v. Harrison, 3 T. R. 760. Anon., cited 15 East, 407.* What is said by the servant at the time of the sale is evidence; but an acknowledgment at another time is not so; and the servant must, therefore, be called. *Helyear v. Hawke, 5 Esp. 72.* Thus, where the horse had been already sold, and the vendor's servant, on delivering him to the purchaser, made certain statements and signed a receipt for the price containing a warranty, it was held that the vendor was not bound by such statements or receipts; no express authority to warrant being shown. *Woodin v. Burford, 2 C. & M. 391. S. C. 4 Tyr. 64.* A receipt for the price containing the warranty is admissible to prove the latter, though only bearing a receipt stamp. *Skrine v. Elmore, 2 Camp. 407.* But such a receipt, given after the bargain, is not conclusive evidence of it. *Fairmaner v. Budd, 7 Bing. 574.*

Where the plaintiff declared on a warranty that the horse was sound, and the warranty proved was, that the horse was sound everywhere, except a kick on the leg, it was held a variance. *Jones v. Cowley, 4 B. & C. 445.* As to variances, see *antè*, pp. 60. 67.

Breach of the warranty.] By rule H. T., 4 W. 4., the plea of *non assumpsit* only operates as a denial of the fact of the warranty having been given upon the alleged consideration; but not of the breach. If

the breach be denied, the plaintiff must give positive proof of unsoundness, &c. at the time of the sale ; a suspicion that the horse was unsound is not sufficient. *Eaves v. Dixon*, 2 Taunt. 343. The term "sound" implies the absence of a disease or the seeds of a disease, which impairs the natural usefulness of the animal. *Kiddell v. Burnard*, 9 M. & W. 668. It was ruled by Lord Ellenborough, that an infirmity, as a temporary lameness which renders a horse less fit for present use or convenience, though not of a permanent nature, and though removed after action brought, was an unsoundness. *Elton v. Brogden*, 4 Camp. 281. S. C. 1 Stark. 127. A cough, though not permanent, is therefore an unsoundness. *Coates v. Stephens*, 2 M. & Rob. 157. *Shillitoe v. Claridge*, 2 Chit. 425. But in *Garment v. Barra*, 2 Esp. 673., it was ruled by Eyre C. J., that a horse labouring under a temporary injury or hurt is not an unsound horse. Roaring is not, it is said, necessarily unsoundness, unless symptomatic of disease ; *Bassett v. Collis*, 2 Camp. 523. ; but if it is of such a nature as to incommode the horse when pressed to his speed, it is an unsoundness. *Onslow v. Eames*, 2 Stark. 81. Mere badness of shape (such as may produce cutting), though it may render the horse incapable of work, is not unsoundness. *Dickinson v. Follett*, 1 M. & Rob. 299. *Brown v. Elkington*, 8 M. & W. 132. A nerved horse is unsound. *Best v. Osborne*, R. & M. 290. Vice, as crib-biting, is not tantamount to unsoundness. *Scholefield v. Robb*, 2 M. & Rob. 210. Whether thrushes, splints, or quidding be unsoundness, is a disputed question ; *Bassett v. Collis*, 2 Camp. 524. (n) ; but a splint, which afterwards produces lameness, is an unsoundness, even before the lameness is produced. *Margetson v. Wright*, 8 Bing. 454. So a horse spavined. *Watson v. Darton*, 7 C. & P. 85. Or chest foundered. *Atterbury v. Fairmaner*, 8 B. Moore, 32. It need not be averred, nor, if averred, proved, that the defendant knew of the unsoundness. *Williamson v. Alison*, 2 East, 446. Proof that a horse is a good drawer will not satisfy a warranty that he is "a good drawer, and pulls quietly in harness." *Coltherd v. Puncheon*, 2 D. & R. 10.

Damages.] If the horse has been returned, the plaintiff will be entitled to recover the whole price ; if kept, the difference between the value and the price ; or the plaintiff may sell the horse for what he can get, and recover the residue of the price in damages. *Caswell v. Coare*, 1 Taunt. 566. If the horse is not tendered to the vendor, the vendee can recover no damages for the expense of his keep ; *ibid* ; but where the seller rescinded the contract, it was held that he was liable for the keep of the horse from the time of the contract ; *King v. Price*, 2 Chitty, 416. ; though for such a space of time only as would be required to re-sell the horse to the best advantage ; *M'Kenzie v. Hancock*, R. & M. 436. Where, after notice to the vendor that the horse might be taken away, it was re-sold, the vendor was held liable for the keep for a reasonable time, which was ruled to be a question for the jury. *Chesterman v. Lamb*, 2 A. & E. 129. Where A. warranted a horse to B., who re-sold him with a warranty to C. ; and, the horse proving unsound, C. sued B., who gave notice to A. of the action, and offered him the option of defending it, but A. not giving any answer, B. defended the action and failed, it was held that A. was liable in an action on the warranty for the costs of the action brought by C. against B. *Lewis v. Peake*, 7 Taunt. 153. S. C. 2 Marsh. 431. In an action for breach of war-

ranty of a horse, the plaintiff cannot recover as special damage the loss of a bargain for re-sale of the horse, though the contract of re-sale at a profit had been actually completed before the unsoundness was discovered: but the plaintiff having bought for 45*l.*, and re-sold at 55*l.*, and having been obliged to take back the horse in consequence of the unsoundness, and ultimately to sell him at 17*l.*, *quære*, whether the measure of damages be the difference between the price given by the plaintiff, and that ultimately obtained by him; or between the last-mentioned price and the actual value of the horse if he had been sound at the time of the last re-sale? and whether the advance of price on the first re-sale by the plaintiff may be left to the jury as a measure of such value? *Quære*, also, whether the plaintiff may recover in respect of such advance of price as the produce of his care and expense bestowed upon the horse between the times of the purchase and of the first re-sale? *Clare v. Maynard*, 6 A. & E. 519. In *Cox v. Walker*, 6 A. & E. 523. (n), the plaintiff had bought the horse of the defendant for 100*l.*, and had been offered 140*l.* for him; but, the horse proving unsound, plaintiff had been obliged to give up the bargain and to sell him for 49*l.* 7*s.*: Lord Denman C. J. directed the jury that the plaintiff was entitled to recover the difference between the price at which he had sold and the actual value of the horse if he had been sound at the time of such sale; and he left to the jury, as a measure of such value, the price offered for the horse while in the plaintiff's hands.

Competency of witness.] It has been held that a former proprietor of a horse, who has sold him with a warranty to the defendant, is a competent witness for him to prove that the horse was, at the time of the sale by himself, sound; for it does not appear that the horse was unsound at that time, and, unless it were, the witness would not be liable to the defendant; *Briggs v. Crick*, 5 Esp. 99.; and similar evidence was admitted by Lord Tenterden in *Baldwin v. Dixon*, 1 M. & Rob. 59. But in a later case Alderson J. held the witness incompetent, saying that the effect of the verdict would be to relieve the witness from an action at the suit of the defendant. *Biss v. Mountain*, 1 M. & Rob. 302.; and see the note of the reporter. *Id.* 303. The late statute has, it should seem, now rendered such a witness competent, unless the action is defended at his expense.

ASSUMPSIT ON PROMISE OF MARRIAGE.

To maintain this action, the plaintiff must prove, under non assumpsit, the contract and promise of the defendant as stated. The promises must be mutual, the reciprocity constituting the consideration. 1 *RoL. Ab.* 1. 5. 22. Either a man or woman may sue for breach of promise of marriage, although an attempt was made, in *Harris v. Cage*, 5 Mod. 411., to resist an action by the former, on the ground that marriage is not an advancement for a man. As an infant may enforce an advantageous contract, although not bound thereby, so an infant may sue a person of full age for breach of promise of marriage. *Holt v. Ward*, 2 Strange, 937. *Warwick v. Bruce*, 2 M. & S. 209. This action

falls within the general rule *actio personalis moritur cum persona*; and cannot be maintained by an executor or administrator, unless perhaps under peculiar circumstances where a strict pecuniary loss has accrued to the party deceased, and the personal estate been endamaged accordingly; which special damage must be stated on the record, for it will not be intended. *Chamberlain v. Williamson*, 2 M. & S. 416.

Proof of the contract.] At first it was held that mutual promises to marry come within the fourth section of the statute of frauds; *Com. Dig. Action on the case*, (F. 3.); but in *Bull. N. P.* 210., a contrary doctrine is laid down, and it is now settled that the promises need not be in writing. Should, however, written evidence of the contract be produced, no stamp is required. *Orford v. Cole*, 2 Stark. 351. A promise on the part of a woman may be presumed from such circumstances of acquiescence, or tokens of approval, as ordinarily attend the acceptance of an offer of marriage; her presence when the offer was made, and the consent of parents asked, without her making any objection; her subsequent reception of the suitor's visits, and concurrence in the arrangements for the wedding; her demeanour as one consenting and approving, &c.; for express consent in words is not necessary. *Daniel v. Bowles*, 2 C. & P. 554. *Hutton v. Mansell*, 3 Salk. 16. But to prove a promise by a man undoubtedly more would be necessary, neither the usages of society nor considerations of delicacy interfering to restrain an explicit declaration on his part. A promise to marry generally is, in law, a promise to marry within a reasonable time; and although an admission of a special promise to marry at a particular time should be proved in evidence, it may be left to a jury to infer from the circumstances a general promise. *Potter v. Deboos*, 1 Stark. 83. *Phillips v. Crutchley*, 1 Moore & P. 239. But see *Atchinson v. Baker*, 2 Peake, 108.

The breach of the promise.] To prove the breach of the promise, evidence must be given either that the defendant has married another, so that performance is no longer possible; or that a tender has been made by the plaintiff, followed by a refusal on the part of the defendant. For this purpose it has been held sufficient that the father of a female plaintiff demanded performance of the defendant. *Gough v. Farr*, 2 C. & P. 631. Any conduct or circumstances evincing the readiness of the one party, and the contrary determination of the other, would be evidence of a tender and refusal.

Defence.

If, after entering into a contract of marriage, either party discover gross immorality, or depraved conduct in the other, it may be pleaded in bar of the action; thus brutal and violent conduct in the man, accompanied with threats of ill usage to the woman, goes to the ground of the action; *Leeds v. Cook*, 4 Esp. 258.; and if a man has been paying his addresses to one whom he supposes to be a modest person, and he afterwards discovers her to be a loose and immodest woman, and, on such account, refuses to fulfil his promise of marriage, he is justified in so doing. *Baddeley v. Mortlock*, Holt, 151. *Irving v. Greenwood*, 1 C. & P. 350. So a subsequent discovery of any serious bodily infirmity,

which would affect the future happiness of the parties, will justify a breach of contract. *Atchinson v. Baker*, 2 Peake, 104. But if a man knowingly promises to marry a loose and immodest woman, he is bound by such promise. *Per* Lord Tenterden C. J., *ibid.* To entitle the defendant to a verdict on the ground of the bad character of the plaintiff, it is not sufficient to show that charges (as of pecuniary dishonesty and perjury) were made against him, which he promised, but failed to explain: He must go further in order to bar the action, and show that the charges were well founded. *Baddeley v. Mortlock*, Holt, 151. To show the general bad character of the plaintiff a witness may state what has been said by third persons; and it is not necessary to produce those persons. *Foulkes v. Sellway*, 3 Esp. 236., *antè*, p. 32. Misrepresentation, or wilful suppression of the real circumstances of the family and previous life of the plaintiff, is a good defence to the action. *Wharton v. Lewis*, 1 C. & P. 581. If a female plaintiff is privy to her father's representations respecting her, his letters are evidence for the defendant to show deceit on her part; although she will not be answerable for particular expressions. But a false representation, made orally by the father to a third person in the absence of the plaintiff and without her privity, and by such person communicated to the defendant, is not admissible. *Foot v. Hayne*, 1 C. & P. 547.

ASSUMPSIT ON AN AWARD.

In assumpsit on an award, the plaintiff must prove the submission and award and the performance by himself of any conditions precedent put in issue by the pleas. Where the submission is by a judge's order, which has been made a rule of court, it is sufficiently proved by production of the rule. *Still v. Halford*, 4 Camp. 17. If the time for making the award has been enlarged, and the award made within the enlarged time, the plaintiff must show, if it be put in issue, that the enlargement was duly made according to the terms of the submission or by the consent of the parties. If the enlargement was irregularly made, such irregularity is waived by the appearance of the parties without objection before the arbitrator after the enlargement. *Re Hick*, 8 Taunt. 694. *Lawrence v. Hodgson*, 1 Y. & J. 16. The plaintiff need not prove that the defendant had notice of the award; for he is bound to take notice of the award, as well as the plaintiff. 2 Saund. 62. a (n). As to the proof and effect of an award, see *antè*, pp. 100. and 151.

Defence.

Where the declaration on an award is in the form of indebitatus assumpsit, the defendant, under the general issue, may object that there is a variance between the award declared on, and that produced in evidence. Where the count is special, the admissibility of such proof depends on the plea. Corruption or misconduct of the arbitrators is not matter of defence; at least where application might have been successfully made to the court to set such award aside. *Wills v. Mac-carmick*, 2 Wils. 148. *Braddick v. Thompson*, 8 East, 344. *Brazier v.*

Bryant, 3 Bing. 167. Nor can the award be impeached on the ground that the decision of the arbitrator has proceeded on a mistake. *Johnson v. Durant*, 2 B. & Ad. 925. *Ashton v. Poynter*, 1 C. M. & R. 738. But he may insist on a defect on the face of the award which avoids it.

ASSUMPSIT ON AN ATTORNEY'S BILL.

In an action upon an attorney's bill, the plaintiff must prove, under the general issue, his retainer by the defendant, which may be shewn by showing that the defendant attended at his office, and gave directions: 2. That the business was done, which may be proved by a clerk, or other agent, who can speak to the existence of the causes and the business in respect of which the charges are made, and can prove the main items, without proving every item to have been done. *Philips v. Roach*, 1 Esp. D. N. P. 10. If there are no taxable items in the bill, it will also be necessary to give general evidence of the reasonableness of the charges. Proof of a judge's order referring the bill to be taxed, and of the defendant's undertaking to pay what shall appear to be due, and of the master's *allocatur*, will be sufficient proof both of the retainer and of the business having been done. *Lee v. Jones*, 2 Camp. 496.

Where the demand is for fees, charges, or disbursements, at law or in equity, the plaintiff cannot recover until the expiration of one (lunar) month or more after he has delivered to the party or parties to be charged therewith, or left for him or them at his or their dwelling-house or last place of abode, a bill of such fees, charges, and disbursements, subscribed with the proper hand of such attorney or solicitor; 2 G. 2. c. 23. s. 23.; and he must, therefore, prove the delivery of such bill. But he must be put to such proof by a special plea; the general issue is not now sufficient. *Lane v. Glenny*, 7 A. & E. 83. Intelligible abbreviations will not vitiate the bill. The name of the court in which the business has been done, is not required to be stated in the bill by 3 Jac. 1. c. 7., nor, as it seems, by 2 G. 2. c. 23. s. 23. *Reynolds v. Caswell*, 4 Taunt. 193. *Frowd v. Stillard*, 4 C. & P. 512. In an action by two attorneys, partners, a bill signed in the name of the firm is sufficient. *Smith v. Brown*, 1 C. & J. 542.

Costs, charges, and disbursements.] Where the demand is partly for taxable items, and partly for items not taxable, it has been held that the plaintiff may recover for charges or disbursements not taxable, provided he has delivered no bill at all; but where he has delivered a bill irregularly, he cannot; and, therefore, where a single item for business done in court is inserted in the bill, it must be proved to have been signed and delivered according to the statute. *Winter v. Payne*, 6 T. R. 645. *Mowbray v. Fleming*, 11 East, 285. And where the plaintiff had been employed in defending a cause, and had done other business not taxable, and had delivered separate bills, Lord Tenterden ruled, that all ought to have been included in one bill, and that the second bill ought to have been delivered a month before the action. *Thwaites v. Mackerson*, M. & M. 199. *James v. Child*, 2 C. & J. 678. But where a bill is delivered according to the statute, containing various taxable

items, some items of which are not sufficiently described according to the provisions of the statute, the plaintiff may recover the residue of the bill. *Waller v. Lacy*, 1 M. & G. 54.

The following have been held to be taxable items, viz. preparing a warrant of attorney (*Sandom v. Bourn*, 4 Camp. 68.; *Painter v. Lindsell*, 6 New Ca. 197.; *Wilson v. Gutteridge*, 3 B. & C. 157.); a dedimus postestatem (*Ex parte Prickett*, 1 N. R. 266.); an affidavit to hold to bail. (*Winter v. Payne*, 6 T. R. 645. So items for attending and examining bail, and attending the plaintiff in several actions against the defendant, and arranging to take cognovits therein. *Watt v. Collins*, R. & M. 284. So attending and advising a party who has been served with a writ. *Smith v. Taylor*, 7 Bing. 259. So the obtaining a bankrupt's certificate. *Collins v. Nicholson*, 2 Taunt. 321. *Ford v. Webb*, 3 B. & B. 241. So attending at a lock-up-house and obtaining the defendant's release and filling up the bail bond. *Fearne v. Wilson*, 6 B. & C. 87. Attesting a replevin bond. *Wardle v. Nicholson*, 4 B. & Ad. 469. So where the attorney proceeds only for costs out of pocket. *Miller v. Towers, Peake*, 102. But a bill for conveyancing alone is not taxable; *Anon. Tidd*, 329.; nor is preparing an affidavit of a petitioning creditor's debt and bond to the chancellor for a commission of bankrupt, a taxable item; the affidavit having never been sworn, nor the commission issued; *Burton v. Chatterton*, 3 B. & A. 486.; nor searching at the judgment office; *Fenton v. Correa*, R. & M. 262.; nor working a country commission; though it is otherwise in the London court of bankruptcy, which is made a court of law and equity by statute. *Harper v. Williams*, 9 Dowl. P. C. 618., S. C. 2 M. & G. 815. Money, paid by an attorney in consequence of his undertaking to pay debt and costs, is not a disbursement within the statute. *Prothero v. Thomas*, 6 Taunt. 196. Where a bill contains taxable articles, and a separate demand for money lent on a distinct occasion, the latter may be recovered, though the bill was not regularly signed. *Heming v. Wilton*, M. & M. 529. *Hill v. Humphreys*, 2 B. & P. 343. But where a bill containing taxable items, and also an item for 3*l.* for money lent by the plaintiff to the defendant for the purpose of paying costs, had not been properly delivered, it was held that the 3*l.* could not be recovered. *Smith v. Taylor*, 7 Bing. 259. A distinction has been taken in these cases between items which have no reference to the plaintiff's professional character, and items which, though not taxable, have such reference; and in the former case it seems that he may recover, though a bill may have been irregularly delivered. See *Miller v. Towers, Peake*, 102. And it has been held that an attorney, not having delivered any bill to his client before action brought, but particulars of demand containing some taxable items after action brought, cannot recover for an item not taxable, if such item be in respect of business done or money paid to his client's use in his character of attorney. *Wardle v. Nicholson*, 4 B. & Ad. 469.

A bill must be delivered under the statute for business done at the quarter sessions (*Clarke v. Donovan*, 5 T. R. 694. *Sylvester v. Webster*, 9 Bing. 388.); or the Insolvent Debtors' Court (*Smith v. Wattleworth*, 4 B. & C. 364.); or the county court; *Wardle v. Nicholson*, 4 B. & Ad. 469. So a bill for business done in a criminal prosecution in the court of Great Sessions of Caermarthen was held taxable; *Lloyd v. Maund, Tidd*, 330.; but see 2 *Meriv.* 500. But business done in the House of Lords on the prosecution of an appeal is not taxable. *Williams v.*

Odell, 4 Price, 279. A signed bill need not be delivered by an attorney suing for business done in the Middlesex Court of Requests; *Becke v. Wells, 1 C. & M. 75.*; nor for business done under a commission of bankruptcy. *Hamilton v. Jones, 4 M. & P. 869.* *Crowder v. Davies, 3 Y. & J. 433.*

An agreement entered into by a client with his attorney to pay him at a certain specified rate for business to be done, is not binding, or, at all events, is not conclusive, upon the client. *Drax v. Scroope, 2 B. & Ad. 581.*

Though an attorney of one court may, with the consent and in the name of an attorney of another court, practise in the latter court, yet if he practises there in his own name he cannot recover his fees. *Latham v. Hyde, 1 C. & M. 128.* *S. C. 3 Tyr. 143.* See *Hockley v. Bantock, 2 Myl. & K. 437.* So in an action by several partners, attorneys, for business done in the Palace Court, it appearing that only one of the plaintiffs was an attorney of that court, it was held that they could not recover. *Arden v. Tucker, 1 M. & Rob. 191.*

An attorney's bill cannot be recovered on an account stated, though the amount has been admitted, without proof of the delivery of a bill. *Eicke v. Nokes, 1 M. & Rob. 359.*

Delivery of the bill.] The bill should not only be delivered, but left with the defendant. *Brooks v. Mason, 1 H. Bl. 290.* Showing and explaining the bill, without a regular delivery, is not sufficient. *Crowder v. Shee, 1 Camp. 437.* It is not sufficient to prove that the bill was delivered at a particular place, not shown to be the defendant's abode, and that the defendant afterwards delivered it to his attorney's clerk. *Eicke v. Nokes, M. & M. 305.* An indorsement on the bill in the handwriting of the plaintiff's clerk, since dead, proved to have existed at the time of the date, and stating that a copy was on such a day delivered to the defendant, together with proof that it was the clerk's duty to deliver the bill, and that such an indorsement was usually made in the course of business, will be sufficient *prima facie* evidence of the due delivery. *Champneys v. Peck, 1 Stark. 404.* See the cases cited, *antè*, p. 36.

To whom.] A personal service is not necessary, but a delivery to an agent appointed by the party to receive it, will be sufficient. *Per Lord Ellenborough C. J., Finchett v. How, 2 Camp. 277.* Thus the delivery of the bill to the attorney of the party is good. *Warren v. Cunningham, Gow. 71.* *Vincent v. Slaymaker, 12 East, 372.* So a delivery to one of several persons, who has been authorised to act for the others, is a delivery to all; *Finchett v. How, 2 Camp. 277.*; and seems sufficient in an action against any one of them. *Crowder v. Shee, 1 Camp. 437.* Thus, where an attorney had been retained jointly by several parties to defend several suits against each, in the subject matter of which they had a common interest, it was held that the delivery of a bill to one was sufficient to enable the plaintiff to maintain a joint action against all. *Oxenham v. Lemon, 2 D. & R. 461.*

At what time.] The bill must be proved to have been delivered one (lunar) month before the commencement of the action. The *Nisi Prius* record was formerly sufficient *prima facie* evidence, when made up of a term commencing more than one month after the delivery of the bill,

that the action had not been brought too soon, and made it incumbent on the defendant to prove, if the fact was so, that the action was commenced too soon by producing a copy of the writ (*Webb v. Pritchett*, 1 B. & P. 263.; *Rhodes v. Gibbs*, 5 Esp. 163.); or the declaration *Harris v. Orme*, 2 Camp. 497 (n). But now, by the Uniformity of Process Act, 2 W. 4. c. 39. s. 11., the issuing of the writ of summons is for all purposes the commencement of the suit. *Alston v. Underhill*, 1 C. & M. 492. And the date of the issuing appears on the Nisi Prius record.

At what place.] Leaving the bill at the defendant's counting-house is not sufficient. *Hill v. Humphreys*, 2 B. & P. 343. It seems that it is sufficient to leave it at his last known place of abode, and it is no answer for the defendant to show that he had left that place of abode, without also showing that he had a later known one. *Wadson v. Smith*, 1 Stark. 324.

Proof of the bill.] The bill may be proved by a copy or duplicate original, without any notice to produce the bill delivered. *Anderson v. May*, 2 B. & P. 237. *Colling v. Treweek*, 6 B. & C. 394. A mistake in the date of the items, which does not mislead, will not vitiate the delivery of the bill. *Williams v. Barber*, 4 Taunt. 806. Where the bill has been taxed, the master's *allocatur* is not conclusive against the plaintiff on a plea of *nunquam indebitatus*, but only strong evidence that no more is due. *Beck v. Cleaver*, 9 Dougl. P. C. 111.

Cases in which a bill need not be delivered.] A signed bill need not be delivered, though containing taxable items, when it is due from one attorney or solicitor to another attorney or solicitor; 12 G. 2. c. 13. s. 6.; though the defendant only became an attorney after the business was done, and before action brought; *Windsor v. Herbert*, 7 M. & W. 375.; *Widdbore v. Bryan*, 8 Price, 677. And such a bill is not within the statute, 3 Jac. 1. c. 7. s. 1. *Sandys v. Hornby*, 1 M. & Rob. 33. Nor need the executor or administrator of an attorney deliver a bill. *Williams v. Griffith*, 10 M. & W. 125. Nor the assignee of an insolvent attorney. *Lester v. Lazarus*, 2 C. M. & R. 665. To set-off a bill, it has been held sufficient to deliver it in time for the plaintiff to have it taxed before the trial. *Martin v. Winder*, 1 Doug. 199 (n), *Tidd*. 335. But in *Murphy v. Cunningham*, 1 Anstr. 196., a regular delivery was held necessary, though *Martin v. Winder* was cited, *contra*. In *Bulman v. Birkett*, 1 Esp. 449., it is said to have been held by Lord Kenyon, that it was not necessary that a month's time should intervene between the delivery and the action.

Defence.

Where a bill has been delivered containing taxable items, the defendant cannot object to the reasonableness of the charges at the trial. *Anderson v. May*, 2 B. & P. 237. *Lee v. Wilson*, 2 Chitly's R. 65. The delivery of a former bill is conclusive against an increase of charge on any of the same items contained in a subsequent bill, and strong presumptive evidence against any additional items; but real errors or omissions are to be allowed for. *Loveridge v. Botham*, 1 B. & P. 49.

The plaintiff's negligence in the conduct of the business cannot be set up as a defence; *Templer v. M'Lachlan*, 2 N.R. 136.; unless it has been such as to deprive the defendant of all benefit; or the charges sought to be recovered have been occasioned by the plaintiff's want of proper caution. *Huntley v. Bulwer*, 6 New Ca. 111. *Bracey v. Carter*, 12 A. & E. 373. And such failure of consideration is evidence in non-assumpsit. *S. C. ib.* But if there are other causes conducing to the loss of the benefit besides the plaintiff's negligence, the negligence is no defence to the action. *Daz v. Ward*, 1 Stark. 409. If an attorney, through inadvertence or inexperience, incurs trouble which is useless to his client; he cannot recover a remuneration for such trouble. *Hill v. Featherstonhaugh*, 7 Bing. 569. And this may be shown under the general issue. *Hill v. Allen*, 2 M. & W. 283. Entire items for useless work may be discarded by the jury. *Shaw v. Arden*, 9 Bing. 288. It is no defence to an action for business done in defending a suit, that the plaintiff was instructed to put in a plea in abatement for delay, which he neglected to do, whereby the defendant had judgment against him. *Johnson v. Alston*, 1 Camp. 176. Where an attorney prepares a document, which is illegal, but with regard to the legality of which there was a reasonable doubt, he is entitled to recover for preparing it. *Potts v. Sparrow*, 6 C. & P. 749.

An allegation of a tender of a reasonable sum to the plaintiff is not supported by proof of an offer to pay when the bill shall have been taxed. *Filmer v. Burnby*, 2 M. & G. 529. It is a good defence that the plaintiff paid no attention to the defendant's case, but resided a considerable distance from the place where his business was carried on, and that, in fact, the business was transacted there by his articulated clerk. *Taylor v. Glasbrook*, 3 Stark. 75. *Hopkinson v. Smith*, 1 Bing. 13. So it is a good defence that the plaintiff undertook the cause *gratis*; and the declarations of his clerk, when he attended to tax the costs in the cause, are evidence for the defendant. *Ashford v. Price*, 3 Stark. 185. And on a plea of payment of money into court, and *nanquam indeb.* to the residue, the defendant may show that the plaintiff had agreed, on a certain event which had occurred, that the work should be done for costs out of pocket, which did not exceed the sum paid in. *Jones v. Beade*, 5 A. & E. 529.

The defendant may prove, under a proper plea, that the plaintiff has neglected to take out his certificate, by which his admission has become void; 37 Geo. 2. c. 90. s. 31. But where, in an action brought by an attorney in 1825, the defendant proved that the plaintiff had not taken out any certificate during the years 1814, 1815, 1818, 1819, and 1820, but did not prove that the plaintiff had not been re-admitted after that time, and there was evidence that, in 1824, the plaintiff had acted as an attorney and been retained by the defendant in that character, it was held that this *prima facie* evidence entitled the plaintiff to recover. *Pearce v. Whale*, 5 B. & C. 38. And an attorney may maintain an action for business done at a time when he was uncertificated, provided a certificate be taken out by him before the end of a year after the expiration of the period to which the prior certificate extended. *Bowler v. Brown*, 2 A. & E. 116. It is no defence, in an action for fees due for the suing out a commission of bankruptcy, that the plaintiff is only an attorney of K. B., and not a solicitor in chancery. *Wilkinson v. Diggell*, 1 B. & C. 158. Nor that the plaintiff refused to go on with a suit in chancery, if the do-

fendant did not supply him with money. *Rowson v. Earle, M. & M. 538.* For though an attorney cannot, suddenly, and without notice, abandon a cause, yet, if he gives reasonable notice, he is at liberty to discontinue the conduct of it on his client refusing to supply him with money. *Vansandau v. Browne, 9 Bing. 402.*

Where one attorney does business for another, the attorney who does the business universally gives credit to the attorney who employs him, and not to the client for whose benefit it is done. If the attorney in such case intends not to be personally responsible, it becomes his duty to give express notice that the business is to be done on the credit of the client. It furnishes no defence that the business was known by the plaintiff to be done for the benefit of the client. *Scrace v. Whittington, 2 B. & C. 11.* An attorney is not personally liable to a witness whom he subpoenas to give evidence for his client. *Robins v. Bridge, 3 M. & W. 115.*

The contract to conduct a suit is entire, and where the suit ended within six years, the Statute of Limitations will not bar the demand for so much of the business as was done more than six years ago. *Harris v. Osbourn, 2 C. & M. 629.*

ASSUMPSIT ON APOTHECARY'S OR SURGEON'S BILL.

The plaintiff, if an apothecary, must in the first instance prove his title to sue as such; for by statute 55 Geo. 3. c. 194. s. 21. (explained and amended by 6 Geo. 4. c. 133.) no apothecary shall be allowed to recover any charges claimed by him in any court of law, unless he shall prove on the trial, that he was in practice as an apothecary on the 1st of August, 1815, or that he has obtained a certificate to practise, as such, from the Apothecaries' Company. This proof must still be given, since the new rules of pleading, though *non assumpsit* only be pleaded; or where the defendant pleads (in debt) *nunquam indeb.* to part, and to the rest a tender. *Shearwood v. Hay, 5 A. & E. 383. Wagstaffe v. Sharpe, 3 M. & W. 521.* The plaintiff need not prove his identity with the party named in the certificate. *Simpson v. Dismore, 9 M. & W. 47.* The statute does not relate to physicians, chemists, or druggists, or to the College of Surgeons. Sec. 28, 29. But a person authorised to practise as a physician by a Scotch diploma is not a physician within the statute; the provisions of the act applying only to England and Wales. *Apothecaries' Comp. v. Collins, 4 B. & Ad. 604. Collins v. Carnegie, 1 A. & E. 695.* And chemists who practise as apothecaries are not exempted from the operation of the statute by sect. 28. *Semb. Apothecaries' Comp. v. Greenough, 1 Q. B. 799.* It was ruled by Best C. J. that an apothecary may either charge for his attendances, or for the medicines which he supplies; but that he cannot charge for both; *Towne v. Lady Gresley, 3 C. & P. 581.*; but see *Handley v. Henson, 4 C. & P. 110. post, p. 261.*

Proof of practice as an apothecary.] Merely administering medicines previous to the 1st of August, 1815, will not be sufficient to prove that the party practised as an apothecary; and incapacity to make up the

prescriptions of a physician will be cogent evidence to prove the negative. *Apothecaries' Comp. v. Warburton*, 3 B. & A. 40. An unqualified person, dispensing medicines of his own advice, is within the penalties of the Apothecaries' Act, 55 Geo. 3. c. 194. *The Apothecaries' Comp. v. Allen*, 4 B. & Ad. 625. It has been ruled by Lord Tenterden that curing a local complaint is not sufficient evidence that the party compounded medicines according to prescription. To entitle him to sue, he must have practised the general duties of an apothecary; *Thompson v. Lewis*, M. & M. 255.; viz. making up medicines prescribed by a physician or other person, or by himself; and acting as accoucheur or surgeon only is not such practice. *Woodward v. Ball*, 6 C. & P. 577.

Certificate.] By 6 Geo. 4. c. 133. s. 7. the common seal of the Company of the Apothecaries is sufficient proof of the certificate, and that the person therein named is qualified to practise; but the seal must be proved to be the seal of the company. *Chadwick v. Bunning*, R. & M. 306. A general certificate, not confining the party to practise in the country, will entitle him to recover for business done in London, although he has only paid the price of the country certificate. *Ibid.* The certificate supersedes the necessity of proving an apprenticeship served. *Sherwin v. Smith*, 1 Bing. 204.

Where a promissory note was given "in consideration of the plaintiff's care and medical attendance" bestowed upon the maker, and notice was given of disputing the consideration of the note, it was held (before the new rules of pleading) to be incumbent upon the plaintiff to prove himself qualified by statute 55 Geo. 3. c. 194. *Blogg v. Pinkers*, R. & M. 125.

Surgeon's Bill.

By 3 Hen. 8. s. 11. c. 1. no one shall act as a surgeon within the city of London or seven miles round, unless he be examined and licensed by the College of Surgeons, under the penalty of 5*l.* per month. It is incumbent upon the defendant, if he intends to avail himself of the plaintiff being unlicensed, to prove that fact; *Gremare v. Le Clerc Bois Valon*, 2 Camp. 144.; and, since the late rules, to plead it. It was also intimated in that case that, as the statute contains no prohibitory clause, a person, though subject to a penalty, may recover for his labour; but this seems to be overruled by *Cope v. Rowlands*, 2 M. & W. 159, 160.

A surgeon who practises as a physician, having no diploma, cannot maintain an action for his fees; *Lipscombe v. Holmes*, 2 Camp. 441.; and if, in his bill, a surgeon leaves a blank for his charge for attendances, and the defendant pays a certain sum into court on that account, the plaintiff is bound by that sum, and cannot recover more. *Tuson v. Batting*, 3 Esp. 192.

A surgeon, not having a certificate from the Apothecaries' Company, cannot charge for his attendance or for administering medicine, except in cases within his own department. He cannot, therefore, recover for attending a patient in the typhus fever. *Allison v. Haydon*, 4 Bing. 619.; and see *Wagstaffe v. Sharpe*, 3 M. & W. 522. note (a). But if the plaintiff be a surgeon and apothecary he may, besides his charges for medicines, recover reasonable charges for attendances. *Handley v. Henson*, 4 C. &

P. 110. *Simpson v. Ralfe*, 4 Tyr. 325. But see *Towne v. Gresley*, *antè*, p. 260. When the plaintiff has abstained from sending in a bill in the lifetime of his patient in the expectation of a legacy, he may afterwards sue the executors. *Baxter v. Gray*, 4 Scott New Rep. 374.

Defence.

If the defendant has received no benefit in consequence of the plaintiff's want of skill, the latter cannot recover. *Kannen v. M'Mullen, Peake*, 59. *Duffit v. James*, cited 7 East, 480. So a person, who professes to cure disorders in a specified time, and induces the defendant to employ him by false and fraudulent representations of his skill, and does not succeed in his cure, cannot recover for medicines and attendance; *Hupe v. Phelps*, 2 Stark. 480.; but the remuneration of a regular practitioner, who has used due care and diligence, does not depend on his effecting a cure. *Per Abbott C.J., ibid.* In the case of a medical man, if an operation, which might have been useful, has merely failed in the event, he is nevertheless entitled to charge; but if it could have been useful in no event, he has no claim on the patient. *Per Alderson J. in Hill v. Featherstonhaugh*, 7 Bing. 574.

A physician can maintain no action for his fees. *Chorley v. Bolcot*, 4 T. R. 317. Unless there be a special contract to pay him. *Veitch v. Russel*, 1 Car. & M. 362.

ASSUMPSIT FOR SERVANTS' WAGES.

In an action by a servant for his wages, the plaintiff must prove a retainer, of which service will be evidence; the length of time of service; and the amount of wages due.

A general hiring, without mention of time, is a hiring for a year; and if during the year the master dismisses his servant without cause, the latter is entitled to his wages until the end of the year. *Beeston v. Collyer*, 4 Bing. 309. And this though the wages are payable monthly. *Fawcett v. Cash*, 5 B. & Ad. 904. But if he leaves his service during the year without cause, it is a forfeiture of the wages due to him, and he cannot recover any thing. *Huttman v. Boulnois*, 2 C. & P. 510. With regard to a menial servant, there is a common understanding (except where a different custom is shown to prevail), that the contract may be dissolved by either party — by the master on paying a month's wages or giving a month's warning; by the servant on giving a month's warning. *Beeston v. Collyer*, 4 Bing. 313. *Nowlan v. Ablett*, 2 C. M. & R. 54. In such case, therefore, if the master, without reasonable cause, turns the servant away, the latter will only be entitled to recover a month's wages. *Robinson v. Hindman*, 3 Esp. 235. But he may recover, on a general count, all the past arrears. *Hartley v. Harman*, 11 A. & E. 798. Other servants, as clerks, &c., may recover their wages for the remainder of the year, and are entitled to reasonable notice ending with a current year. *Williams v. Byrne*, 7 A. & E. 177. *Beeston v. Collyer*, 4 Bing. 309. Where a clerk claims to be a partner, and not a mere clerk, he may be dismissed forthwith as clerk. *Amor v.*

Fearon, 9 A. & E. 546. And where wages are payable quarterly, and the servant is tortiously discharged in the middle of the quarter, he has been allowed to recover for the whole quarter on the general count for work and labour. *Gandell v. Pontigny*, 4 Camp. 375., S. C. 1 Stark. 198. See *Eardley v. Price*, 2 N. R. 333. But it seems that a special action of assumpsit is the proper remedy in such a case. *Smith v. Hayward*, 7 A. & E. 544. If a servant misconducts himself, the master may turn him away without any warning; *Spain v. Arnott*, 2 Stark. 256. *Trotman v. Dunn*, 4 Camp. 212.; and in such case the misbehaviour is a forfeiture of the accruing wages; *Ridgway v. Hungerford Market Co.*, 3 A. & E. 171.; *Sherman v. Bennett*, M. & M. 489.; even though the master has recovered damages against him for his misconduct. *Turner v. Robinson*, 5 B. & Ad. 789. So where a servant embezzles, though his wages due exceed what he has embezzled. *Brown v. Croft*, 1 Chitty Prac. of the Law, 81. The master is not bound to assign the cause at the time of dismissal. *Ridgway v. Hungerford Market Co.*, *supra*. The bankruptcy of the master is not a dissolution of the contract of hiring and service. *Thomas v. Williams*, 1 A. & E. 685. Incapacity by reason of sickness is not a determination of the contract of service, nor will it justify dismissal without regular notice; *R. v. Wintersett*, Cald. 296.; yet disability to perform his duty will prevent a servant from recovering wages, where the agreement is not for any specific term but only for so much as the services of the plaintiff are worth; *Bayley v. Rimnell*, 1 M. & W. 506.; unless in the case of a seaman taken sick on a voyage; *Chandler v. Grievs*, 2 H. Bl. 606.

Where the contract of yearly service is determined by consent in the middle of a quarter, there is no implied contract to pay *pro rata*; but a jury may infer from circumstances an express agreement to pay for the broken part of the year's service. *Lamburn v. Cruden*, 2 M. & G. 253. *Thomas v. Williams*, 1 A. & E. 685.

ASSUMPSIT FOR NOT ACCEPTING GOODS.

In an action of assumpsit for not accepting goods sold, the plaintiff may have to prove the contract and breach, the performance of all conditions precedent on his part, and the amount of damage; or such of these facts as are denied by the pleadings.

The contract.] By the 17th section of the Statute of Frauds, 29 Car. 2. c. 3. no contract for the sale of any goods, wares, and merchandizes, for the price of 10*l.* sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorised.

What contracts are within section 17. of the Statute of Frauds.] Executory contracts are within the statute; *Rondeau v. Wyatt*, 2 H. Bl. 63.; *Garbutt v. Watson*, 5 B. & A. 613.; and therefore a contract

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by the plaintiffs, who were millers, for the sale of flour, which was not at the time prepared so as to be capable of immediate delivery, is within the statute. *Garbutt v. Watson*, 5 B. & A. 613. But where the contract was not for the sale of goods, but for work and labour and materials found, as the subject matter of the contract did not exist in *rerum naturâ*, and was incapable of delivery and of part acceptance, it was held not to be within the statute. *Groves v. Buck*, 3 M. & S. 178. *Smith v. Surman*, 9 B. & C. 576. But now by Lord Tenterden's act, 9 Geo. 4. c. 14. s. 7. the above provision of the Statute of Frauds "shall extend to all contracts for the sale of goods of the value of 10*l.* sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof or rendering the same fit for delivery."

Where several articles are bought at a shop at the same time but at different prices, each under 10*l.*, but amounting altogether to 70*l.*, it has been held to be one contract and within the statute. *Baldry v. Parker*, 2 B. & C. 37.

Sales of goods by auction are within the Statute of Frauds. *Kenworthy v. Schofield*, 2 B. & C. 945. A sale of shares of a joint-stock banking company is not within sect. 17. *Humble v. Mitchell*, 11 A. & N. 205.

With regard to contracts for the sale of growing crops and timber, see the cases cited *antè*, p. 158. 189.

The cases relating to an acceptance of goods within this section of the Statute of Frauds are stated under the head, "*Assumpsit for goods sold and delivered.*" *Post*.

What note or memorandum in writing is sufficient within section 17. of the Statute of Frauds.] The word *bargain* used in the statute means the terms upon which the parties contract. *Kenworthy v. Schofield*, 2 B. & C. 947. The law with regard to the statement of the price in the contract appears to be this, that where the price is omitted, and it does not appear upon the evidence that any specific price was agreed upon, a reasonable price may be presumed, and the contract may be so stated; *Hoadly v. M'Laine*, 10 Bing. 482.; but where the contract is silent as to price, and it appears by the evidence that a specific price was agreed upon, the contract is imperfect, and cannot be given in evidence; *S. C. id.* 489. *Elmore v. Kingscote*, 5 B. & C. 583. A distinction was indeed suggested in *Acebal v. Levy*, 10 Bing. 382., by Tindal C. J., that where the contract is silent as to the price, but has been *executed*, a reasonable price will be inferred; but that it may be questionable whether it is so when the contract is *executory* only, and the goods are still in the possession or under the power of the seller: but the case of *Hoadly v. M'Laine*, *suprà*, which was for not accepting a carriage made to order, does not sanction this distinction. "We agree to give Mr. E. 1*s.* 7*d.* per pound for thirty bales of Smyrna cotton, customary allowance, cash 3 per cent., as soon as our certificate is complete," duly signed, has been held a sufficient memorandum. *Egerton v. Matthews*, 6 East, 307. See *Cooper v. Smith*, 15 East, 103. *Richards v. Porter*, 6 B. & C. 437. The terms of the contract cannot be varied by parol. *Marshall v. Lynn*,

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6 M. & W. 109. ; *Stead v. Dawber*, 10 A. & E. 57. ; *Stowell v. Robinson*, 3 New Ca. 928. Where the price is ambiguous ; as where hops are sold "at 100s.," this may be explained by parol to mean 5*l.* per *cwt.* *Spicer v. Cooper*, 1 Q. B. 424. The written memorandum must be made before action brought. *Bill v. Bament*, 9 M. & W. 36.

As the language of this section is, in substance, the same as that of the fourth section relating to the sale of lands (see *Kenworthy v. Schofield*, 2 B. & C. 947.), the cases already cited, *ante*, p. 189., with regard to the signing of the note or memorandum by the party, and the manner in which two writings may be connected in order to form a complete note or memorandum, may be consulted.

A signature by initials is not enough. *Jacob v. Kirk*, 2 M. & Rob. 221. ; *Sweet v. Lee*, 3 M. & G. 452. Where an auctioneer writes down the buyer's name, or that of his agent, in the catalogue to which the conditions of sale are annexed opposite the lot, together with the price bid, it seems a sufficient memorandum. *Phillimore v. Barry*, 1 Camp. 513. ; *Kenworthy v. Schofield*, 2 B. & C. 945. But where the conditions of sale are not annexed to, or referred to, in the catalogue, signing the buyer's name in the catalogue is not a compliance with the statute. *Hinde v. Whitehouse*, 7 East, 558. ; *Kenworthy v. Schofield*, 2 B. & C. 945. Whether an auctioneer be the agent of both the purchaser and seller depends upon the facts of the particular case. Therefore, where a party, to whom money was due from the owner of goods sold by auction, agreed with the owner before the auction that the goods which he might purchase should be set against the debt, and became the purchaser of goods, and was entered as such by the auctioneer ; it was held that he was not bound by the printed conditions of sale which specified that purchasers should pay a part of the price at the time of the sale and the rest on delivery. *Bartlett v. Purnell*, 4 A. & E. 792. If A., without authority, makes a contract in writing for the purchase of goods by B., and B. subsequently ratifies the contract, such ratification renders the act of A. valid as an agent within the Statute of Frauds. *Maclean v. Dunn*, 4 Bing. 722. The authority of the agent to sell for his principal may be conferred orally. *Acebal v. Levy*, 10 Bing. 378.

A broker is the agent of both parties, and may bind them by signing the same contract on behalf of the buyer and seller. Where bought and sold notes have been delivered by the broker to the parties, those notes are the proper evidence of the contract ; *Thornton v. Meux*, M. & M. 43. ; *Trueman v. Loder*, 11 A. & E. 589. ; and such notes are admissible, though the entry in the broker's book has never been signed by him. *Goom v. Aflalo*, 6 B. & C. 117. If the bought and sold notes materially differ, there will be no valid contract. *Grant v. Fletcher*, 5 B. & C. 436. ; *Thornton v. Meux*, M. & M. 43. A broker gave the following bought and sold notes : 1. "We have this day bought for your use from J. O. B. 100 tons dry palm oil at 31*l.* 10*s.* per ton, to be taken from the quay at landing weights with customary allowances, &c. in cash at fourteen days from delivery, less two and a half per cent. discount, to be delivered from the *Speedy* or *Charlotte* expected to arrive about *November* or *December* next." — 2. "We have this day sold for your use, payment in fourteen days by cash, less two and a half per cent. discount from delivery, 100 tons dry palm oil, at 31*l.* 10*s.* per ton, *ex Speedy* and *Charlotte*, to arrive." Held, that evidence of mercantile usage was admissible to explain all the variances between these notes,

and that being so explained, the variances were not material and did not avoid the contract. *Bold v. Rayner*, 1 *M. & W.* 343. Where the sold note was in the name of an agent, it may be shown by parol on behalf of the plaintiff, that in all previous transactions with the plaintiff the defendant had contracted in the agent's name. *Trueman v. Loder*, 11 *A. & E.* 589. In an action by the purchaser against the vendor of goods for not delivering them, it has been held that the bought note alone is evidence of the contract, and that if the vendor intends to insist on a variance between the bought and sold note, it is for him to produce the latter. *Hawes v. Forster*, 1 *M. & Rob.* 368. If no bought and sold notes have been made out, the entry in the broker's book, signed by him, will be evidence of the contract. *Grant v. Fletcher*, 5 *B. & C.* 436.; *Henderson v. Barnewall*, 1 *Y. & J.* 387. And where the notes disagree, the entry in the book, if brought home to the knowledge of the parties, may be evidence of the contract. *Semb. Thornton v. Charles*, 9 *M. & W.* 802.; and see the observations of Parke B. in that case. Where the broker, in the bought and sold notes, described the seller's firm as A., B., and C.; but the firm had, in fact, unknown to the broker, been changed to A., D., and E., it was held that A., D., and E. might sue on the contract, it not appearing that the defendant had been prejudiced or excluded from a set-off, and there being some evidence of his having treated the contract as subsisting with the plaintiffs. *Mitchell v. Lapage, Holt, N. P. C.* 253. A material alteration in the sale note by the broker, at the instance of the seller, after the bargain made and without the consent of the purchaser, will preclude the seller from recovering. *Powell v. Divett*, 15 *East*, 29.

Performance of conditions precedent.] Where it is the duty of the plaintiff to tender the goods to the defendant, such tender must be averred and proved, if traversed. A tender of, or being ready and willing to deliver, a larger quantity, is not sufficient; at least unless it appear that the defendant might have had, and that the plaintiff was ready to deliver, the smaller quantity, which the defendant was really bound to take. *Dixon v. Fletcher*, 3 *M. & W.* 146. So in an action for not accepting stock, the plaintiff must show that he has done every thing on his part towards the execution of the contract, by proving either a tender or refusal, or that he waited at the bank till the final close of the transfer books on the day when the stock was to be transferred. *Bordenave v. Gregory*, 5 *East*, 107. But where, by the terms of the contract, it is incumbent on the purchaser to fetch away goods, the averment and proof of a tender seem to be unnecessary; and it will be sufficient for the plaintiff to aver and show a readiness to deliver. *Rawson v. Johnson*, 1 *East*, 203.; *Wilks v. Atkinson*, 1 *Marsh.* 412., *post*, p. 269.

Damages.— In an action for not accepting goods to be paid for by a bill, the plaintiff is entitled to recover interest from the time the bill, if given, would have become due. *Boyce v. Warburton*, 2 *Camp.* 480. The difference between the contract price and the market price on the day the contract was broken is the measure of damages. *Boorman v. Nash*, 9 *B. & C.* 145., *post*, p. 269.

Goods bargained and sold.] If the plaintiff should fail on the special count, he may sometimes resort to the count for goods bargained and sold, and will be entitled to recover the whole value of the goods. *Hankey v. Smith, Peake*, 42 (n). Unless there has been an acceptance of the goods, or part thereof, a note or memorandum in writing within the 17th section of the Statute of Frauds must be shown; and where the memorandum was silent as to price, but the parol evidence disclosed a contract at the shipping price, it was held that it did not prove a contract at a reasonable price. *Acebal v. Levy*, 10 Bing. 376., *antè*, p. 61. Where goods in bulk are sold at so much per ton, an action for goods bargained and sold will not lie before they have been weighed. *Per Littledale J., Simmons v. Swift*, 5 B. & C. 857. In order to maintain a count for goods bargained and sold it must appear that the property passed; therefore, where a machine is ordered to be made, the maker, having completed it, cannot sue for goods bargained and sold, if there be no appropriation of the particular machine assented to by the buyer. *Atkinson v. Bell*, 8 B. & C. 277. Whether the vendor can recover on a count for goods bargained and sold, although, before action brought, he has resold the goods, is undecided. See *Mertens v. Adcock*, 4 Esp. 251.; *Hore v. Muner, Peake*, 42 a. (n); *Hagedorn v. Laing*, 6 Taunt. 166. An action for not accepting lies against a purchaser who refuses to take goods, although the vendor has resold them. *Maclean v. Dunn*, 4 Bing. 722.; *Acebal v. Levy*, 10 Bing. 384.

The plaintiffs in London sold to the defendants a quantity of butter which they expected from Sligo; the quality and price were specified in the contract. The butter was to be shipped for London in October, and to be paid for by bill at two months from the date of landing. The butter was not shipped till November; but the defendants waived the objection and accepted the invoice and bill of lading. The butter having been lost by shipwreck, it was held that the property had passed to the defendants, and that they might be sued in an action for goods bargained and sold, or, *per Park J.*, for goods sold and delivered. *Alexander v. Gardner*, 1 New Ca. 671.

Defence.

If the bulk of goods sold by sample does not accord with the sample, the defendant may insist on it as a defence, although it be proved that the common mode of settling disputes of this kind is by making an allowance for the difference. *Hibbert v. Shee*, 1 Camp. 113. So he may show that the goods do not correspond with the kind mentioned in the contract; *Tye v. Fynmore*, 3 Camp. 462.; and, where the action is in the general form of *indebitatus assumpsit*, this defence may still be given in evidence under the general issue; *Cousins v. Paddon*, 2 C. M. & R. 547. The defendant may also show, under the general issue, that the goods were furnished under a special contract with a condition annexed, which the goods delivered did not satisfy. *Grounsell v. Lamb*, 1 M. & W. 352. Though the vendee of a specific chattel delivered with a warranty may not have a right to return it (see *antè*, p. 248. "*Assumpsit on Warranty*"), the same reason does not apply to the case of executory contracts; where an article, for instance, is ordered from a manufacturer, who contracts that it shall be of a certain quality or fit for a certain purpose, and the article sent is never completely accepted

by the person ordering it, the latter may return it as soon as he discovers the defect, provided he has done nothing more in the meantime than was necessary to give it a fair trial. *Okell v. Smith*, 1 *Stark*. 107. Nor will the purchaser of a commodity, to be delivered according to sample, be bound to receive the bulk, if it does not agree with it; nor, after having received what is delivered as being in accordance with the sample, will he be precluded by the simple receipt from returning the article after keeping it a reasonable time for the purpose of comparison. *Street v. Blay*, 2 *B. & Ad.* 463. But where, upon the sale of goods, the seller produces a sample and represents that the bulk is of equal quality, and there is a sale note which does not refer to the sample, it is no defence that the goods are not equal to the sample, though perhaps it may be the ground of a special action for the fraud. *Meyer v. Ewerth*, 4 *Camp.* 22.; see also *Pickering v. Dowson*, 4 *Taunt.* 779. *Kain v. Old*, 2 *B. & C.* 634. Under a contract to purchase 300 tons of Campeachy logwood, at 35*l.* per ton, to be of real merchantable quality, (such as might be determined to be otherwise by impartial judges, to be rejected); it was held that the vendee was bound to take so much of the wood tendered as turned out to be of the sort described at the contract price, though it appeared at the time that a part, afterwards ascertained to be sixteen tons, was of a different and inferior description. *Graham v. Jackson*, 14 *East*, 498. The purchaser by sample has a right to inspect the whole in bulk at any proper and convenient time, and, if the seller refuses to show it, may rescind the contract. *Lorymer v. Smith*, 1 *B. & C.* 1.; see *Parker v. Palmer*, 4 *B. & A.* 387. It was ruled by Abbott C. J., that if a man sells goods to be delivered on a future day, and neither has the goods at the time, nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving them by consignment, but means to go into the market and to buy the goods which he has contracted to deliver, he cannot maintain an action upon such a contract; *Bryan v. Lewis*, *R. & M.* 387.; but the decision seems irreconcilable with the cases which support the legality of stock jobbing; *Wells v. Porter*, 2 *New Ca.* 722—731.; and is, in effect, overruled by *Hibblewhite v. M^r Morine*, 5 *M. & W.* 462.

Where a joint order is given for several articles, at several prices, the contract is entire, and the purchaser may refuse to accept one, unless the others are delivered. *Champion v. Short*, 1 *Camp.* 53. *Baldev v. Parker*, 2 *B. & C.* 37. And where goods are sold "about" a certain quantity "more or less," the latter words are intended to provide only for a small excess, and the purchaser is not bound to accept more: thus on a bargain "for about 300 tons, more or less," the purchaser is not bound to accept 350 tons, at least unless it be shewn that a large excess was contemplated. *Cross v. Eglin*, 2 *B. & Ad.* 106.

ASSUMPSIT FOR NOT DELIVERING GOODS.

In assumpsit against the vendor of goods for not delivering them, the plaintiff may be called upon, by proper pleas, to prove the contract and the breach, the performance of all conditions precedent on his part, and the amount of damages.

Where L. and Co., brokers, sold hemp by auction, described in the invoice as bought of "L. and Co.," and received part of the price, it was held that they had made themselves responsible as sellers, and that they could not defend themselves, in an action for non-delivery, by evidence that they sold as agents and that the invoice had been made out in their names according to a local custom of brokers to secure the passing of the purchase-money through their hands. *Jones v. Littledale*, 6 A. & E. 486.

A., by letter, offered to sell to B. certain goods, "receiving an answer by the course of post." In consequence of A.'s misdirection, B.'s acceptance of the offer arrived two days later than it ought to have done; and on the day following that when it should have arrived, A. sold the goods to a third person: It was held that there was a binding contract from the moment the offer was accepted, and that B. might sue A. in an action for the non-delivery. *Adams v. Lindell*, 1 B. & A. 681. But, in general, where an offer is made, the party who makes it may retract it at any time before acceptance. *Cooke v. Osley*, 3 T. R. 653. *Routledge v. Grant*, 4 Bing. 653. So the bidder at an auction may retract his bidding before the hammer is down. *Payne v. Cave*, 3 T. R. 148.

Where the contract was for the sale of sponge, to be paid for by ochre at &c., the value to be delivered on or before 24th inst. J. R.; in an action for not delivering the sponge it was held that the delivery of the ochre on the 24th was a condition precedent to the plaintiff's right of action. *Parker v. Rawlings*, 4 Bing. 280. Where the agreement was to pay a sum "for each load of straw delivered on the premises," it was held that this imported payment for each load as delivered, and that, the purchaser refusing so to pay, the vendor was not bound to send any more loads. *Withers v. Reynolds*, 2 B. & Ad. 882.

In support of the averment that the plaintiff was ready and willing to accept the goods and to pay for the same, it will not be necessary to prove a tender of the money; *Rawson v. Johnson*, 1 East, 203, *Waterhouse v. Skinner*, 2 B. & P. 447.; and a demand of the goods is sufficient evidence that the plaintiff was ready and willing. *Wilkes v. Atkinson*, 1 Marsh. 412. *Levy v. Lord Herbert*, 7 Taunt. 318. The demand may be by the plaintiff's servant. *Squier v. Hunt*, 3 Price, 68.

Damages.] In an action for not replacing stock at a given day, the plaintiff is entitled to recover according to the price on the day of the trial. *Shepherd v. Johnson*, 2 East, 211. But where goods are to be delivered at a future day, the damages are the difference between the contract price and the price of the goods at or about the day when they ought to have been delivered. *Boorman v. Nash*, 9 B. & C. 145.; *Startup v. Cortazzi*, 2 C. M. & R. 165.

ASSUMPSIT FOR GOODS SOLD AND DELIVERED.

The plaintiff in an action of *indebitatus assumpsit* for goods sold and delivered must be in a condition to prove, 1. The contract of sale, express or implied; 2. The delivery of the goods; 3. The value or price. And all these facts are put in evidence by the plea *non assumpsit*. *Cousins v. Paddon*, 2 C. M. & R. 556.

The contract of sale.] In general, proof of the delivery of the goods to, and receipt of them by, the defendant is *prima facie* evidence of the contract, and supersedes the proof of an order. *Bennett v. Henderson*, 2 Stark. 550. A trading corporation aggregate may sue and be sued in *assumpsit* for goods sold and delivered, and the contract may be implied or express as in the case of an individual; and this implication may arise from the object of the incorporation as compared with the subject-matter of the contract. *Beverley v. Lincoln Gas Company*, 6 A. & E. 829. *Church v. Imp. Gas Company*, *ib.* 846. But where the object of incorporation does not necessarily imply a power of contracting by parol, the old rule of law requiring the contract to be under seal remains unrelaxed. *Mayor of Ludlow v. Charlton*, 6 M. & W. 815.

In some cases where goods have been wrongfully taken, the plaintiff may waive the tort and sue on the implied contract. Thus where the defendant by fraud procured the plaintiff to sell goods to an insolvent, and afterwards got them into his own possession, he was held liable in an action for goods sold. *Hill v. Perrott*, 3 Taunt. 274.; accord. *Abbotts v. Barry*, 2 B. & B. 369. But see *B. N. P.* 130.; *Bennett v. Francis*, 2 B. & P. 554. So where a father fraudulently represented that he was about to relinquish his business in favour of his son, to whom (being a minor) goods were, upon such representation, supplied, which the father took into his own hands, he was held liable for goods sold and delivered. *Biddle v. Levy*, 1 Stark. 20.; *Read v. Hutchinson*, 3 Camp. 352. Where goods are lent, or delivered on the terms of sale or return, and they are retained an unreasonable time, an action for goods sold lies; *Bianchi v. Nash*, 1 M. & W. 545.; *Beverley v. Lincoln Gas Co.*, 6 A. & E. 829.; and the case of *Lyons v. Barnes*, 2 Stark. 39., is not law. Where the owner of property, which has been taken away by another, waives the tort, and elects to bring an action of assumpsit for the value, it is incumbent on him to show a title to the property. *Per Abbot, C. J.*, *Lee v. Shore*, 1 B. & C. 97.

The value of fixtures cannot be recovered under a count for goods sold and delivered; *Lee v. Risdon*, 7 Taunt. 188.; *S. C.* 2 Marsh. 495.; nor the value of standing trees; *Knowles v. Michel*, 13 East, 249.; see *Smith v. Surman*, 9 B. & C. 561. But the value of trees, which the defendant has purchased and carried away, may be recovered under a count for trees sold and delivered. *Bragg v. Cole*, 6 B. Moore, 114. The value of growing crops may be recovered on a count for crops bargained and sold; *Parker v. Staniland*, 11 East, 362.; and the value of crops, taken by an incoming from an outgoing tenant, may be recovered under a count for goods sold. *Per Holroyd J.*, in *Mayfield v.*

Wadley, 3 B. & C. 364.; *Poulter v. Killingbeck*, 1 B. & P. 397. A builder is not entitled to recover the value of the building materials under a count for goods sold and delivered; *Cotterell v. Apsey*, 6 Taunt. 322.; nor can one who contracts to make and erect a steam engine recover the contract price in this form. *Clark v. Bulmer*, 11 M & W. 243.

Where the contract was, that certain goods should be paid for partly in money and partly in buttons, Buller J., held that the plaintiff could not recover under a count for goods sold, but should have declared specially. *Harris v. Fowle*, cited 1 H. Bl. 287.; *Talver v. West*, Holt, N. P. C. 179.; but see *Hands v. Burton*, 9 East, 349. However, where A. agreed to give a horse in exchange for a horse of B. and a sum of money, and the horses were exchanged, but B. refused to pay the money, it was held that it might be recovered under the *indebitatus* count for a horse sold and delivered. *Sheldon v. Cox*, 3 B. & C. 420. So in an action to recover the value of a gun for which the defendant was to give another gun and fifteen guineas, Lord Ellenborough was of opinion, that, upon the refusal of the purchaser to pay for the gun in that mode, a contract resulted to pay its value in money, and that it might be recovered under a count for goods bargained and sold. *Forsyth v. Jervis*, 1 Stark. 437.; *Ingram v. Shirley*, 1 Stark. 185.

An auctioneer may maintain an action in his own name against the buyer of goods sold by him in the course of his employment. *Williams v. Millington*, 1 H. Bl. 81. But the auctioneer has only the same right as the party employing him to sell, and the defendant may show that the rightful owner has claimed the value. *Dickenson v. Naul*, 4 B. & Ad. 638.

Proof of delivery.] A party cannot maintain this action unless he has either delivered the goods or done something equivalent to delivery; as, for instance, by putting it in the vendee's power to take away the goods himself. *Per Holroyd J., Smith v. Chance*, 2 B. & A. 755. An act may be equivalent to a delivery, though not amounting to an acceptance under the Stat. Frauds. *Semb. Thompson v. Maceroni*, 3 B. & C. 1. Where A. agreed to sell to B. certain goods, and earnest was paid, and the goods were packed in cloths furnished by B., and deposited in a building belonging to A. till B. should send for them, A. declaring at the same time that they should not be carried away till he was paid, it was held that this was not such a delivery as to entitle A. to maintain an action for goods sold and delivered. *Goodall v. Skelton*, 2 H. Bl. 316.; see *Simmons v. Swift*, 5 B. & C. 857. So where goods, sold for ready money, were packed up in boxes of the vendee for him and in his presence, but remained at his request on the premises of the vendor, it was held that goods sold and delivered would not lie. *Boulter v. Arnott*, 1 C. & M. 333. Where there is an entire contract to deliver a large quantity of goods consisting of distinct parcels within a specified time, and the seller delivers part, he cannot, before the expiration of that time, bring an action to recover the price of the part delivered; because the purchaser may, if the vendor fail to complete his contract, return the part delivered. But if he retain the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods so delivered. *Oxendale v. Wetherell*, 9 B. & C. 386.; *Shipton v. Casson*, 5 B. & C. 383. Where the defendant hired a musical snuff-box on the understanding that if it was damaged

he was to retain and pay for it, on its being so damaged it was held that the plaintiff might bring goods sold and delivered for the price. *Bianchi v. Nash*, 1 M. & W. 545.; *Beverley v. Lincoln Gas Co.*, 6 A. & E. 829. A contract to deliver means a delivery at usual and convenient hours. Thus an offer to deliver several tons of oil at an unreasonable hour of the night, was held not to satisfy a contract to deliver, generally, within a certain number of days. *Startup v. Macdonald*, 2 M. & G. 395. If the delivery deviates from the mode pointed out by the buyer, yet if notice is sent to him, and he does not repudiate it, he is liable. *Richardson v. Dunn*, 2 Q. B. 218.

To whom delivered.] Proof of a delivery to a third person, at the defendant's request, will support a count for goods sold delivered to the defendant. *Bull v. Sibbs*, 8 T. R. 328. A delivery to a carrier, by whom goods have been usually sent by the plaintiff to the defendant, is a delivery to the defendant; *Hart v. Sattley*, 3 Camp. 528.; and where a tradesman orders goods to be sent by a carrier, though he does not name any particular one, a delivery to the carrier operates as a delivery to the purchaser. *Dutton v. Solomonson*, 3 B. & P. 584.; *Groning v. Mendham*, 5 M. & S. 189. An order for delivery of a rick of hay on a third person, who consents to let it remain on his land, is a sufficient delivery as between the seller and buyer, the latter having undertaken to carry it away himself; but *quære*, whether the action should not be for goods bargained and sold, if the owner of the land afterwards wrongfully refuses to deliver to the buyer? *Salter v. Woodlams*, 2 M. & G. 650. 654. See also *Elliott v. Pybus*, 10 Bing. 512. Where a tradesman makes out an account for goods sold to a particular person, it must be taken as against him that they were furnished on the credit of such person, unless it be shown by unequivocal evidence that the credit was in fact given to another. *Storr v. Scott*, 6 C. & P. 241.; and see *Thomson v. Davenport*, 9 B. & C. 86., *post*, p. 277. In these and similar cases where the goods are above the value of 10*l.* a further question may arise, whether there has been a sufficient *acceptance* of the goods within the Statute of Frauds, so as to make the contract valid without a note or memorandum in writing; as to which see *post*, p. 278—281.

Delivery to partner.] A question frequently arises in actions for goods sold and delivered, whether the defendants are jointly liable as partners. Although the defendant cannot compel the joinder of a dormant partner by a plea in abatement, yet the dormant partner may, at the option of the plaintiff, be joined as defendant. *Lloyd v. Archbowle*, 2 Taunt. 327.; *Ruppell v. Roberts*, 4 Nev. & M. 31. It was held by the court of C. P. that the rule does not extend to the case of an express written contract formally drawn up *inter partes*; and that therefore, where K. and S. entered into a written engagement to employ the plaintiff in their trade for seven years, the plaintiff could not sue D. a dormant partner with K. and S., he not being a party to the agreement. *Beckham v. Knight*, 4 New.Ca. 243. But this case was, in effect, overruled on error. S. C., 1 M. & G. 738., and see *Beckham v. Drake*, 9 M. & W. 79. Though a partnership is constituted by deed, it may, as already stated (*antè*, p. 2.), be proved by parol evidence. An examined copy of an answer in Chancery by two of

the defendants to a bill of a third defendant, charging them as partners and praying for an account, is good evidence to prove the partnership as against the person so answering. *Studdy v. Sanders*, 2 D. & R. 347.

Proof that the defendants suffered their names to be used as partners will be sufficient. If it can be proved that the defendant has held himself out to be a partner, not "to the world," for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it and believed him to be a partner, he is liable to the plaintiff in all transactions in which he gave credit to the defendant upon the faith of his being such partner. *Per Parke J., Dickinson v. Valpy*, 10 B. & C. 140. Though, in point of fact, parties are not partners in trade, yet if one so represents himself, and thereby gets credit for goods for the other, both are liable. *Per Lord Kenyon C. J., De Berkum v. Smith*, 1 Esp. 29.; *Kell v. Nainby*, 10 B. & C. 21. So persons who have been appointed directors of a joint stock company are liable, not having expressly retired from the direction. *Doubleday v. Musket*, 7 Bing. 110. And if the name of a clerk be used in a firm with his own consent, he is liable to third persons as a partner, though he receives no part of the profits. *Guidon v. Robson*, 2 Camp. 302. Persons may be partners in a particular concern or business, yet if they do not hold themselves out as general partners, it will not make them liable in other cases not connected with such particular business. *De Berkum v. Smith*, 1 Esp. 29. And where there is a stipulation between A., B., and C., apparent co-partners, that C. shall not participate in the profit and loss and shall not be liable as a partner, he is not liable as such to those persons who have notice of the stipulation. *Alderson v. Pope*, 1 Camp. 404. (n); *Ridgway v. Philip*, 1 C. M. & R. 415. The plaintiff must show that the name of the defendant was used in the firm with his own consent. *Newsome v. Coles*, 2 Camp. 617.; 2 H. Bl. 235. (n), 4th ed. Where a person allows his name to remain in a firm, either exposed to the public over a shop-door, or used in printed invoices or bills of parcels, or published in advertisements, the knowledge of the party that his name is used, and his assent thereto, is the very ground upon which he is estopped from disputing his liability as a partner. *Per Tindal C. J., Fox v. Clifton*, 6 Bing. 794. If a firm, consisting of several, carry on business in the name of one of the partners, the whole firm will be bound by acts done by him as representing the firm. *South Carolina Bank v. Case*, 8 B. & C. 427.; *Vere v. Ashby*, 10 B. & C. 293.

The liability of a person, as partner, may also be proved by showing that he participated in the profits of the concern; and it is immaterial whether he receives the profits for his own use, or as a trustee for others. Thus the executors of a deceased partner, carrying on trade for the benefit of the estate, are liable personally as co-partners. *Wightman v. Townroe*, 1 M. & S. 412. However small the portion of profits received, it renders the party liable to all the engagements of the partnership. *R. v. Dodd*, 9 East, 527. And it is immaterial whether the plaintiff knew at the time of his dealing with the concern that the party, whom he charges as a partner, participated in the profits. *Es parte Gellar*, 1 Rose, 297.; *Vere v. Ashby*, 10 B. & C. 298. The shareholders in a mining company, conducted by directors, are personally

liable on the contracts made by directors for the supply of the mines, where such contracts are necessary or usual, or where the defendant (a shareholder) can be shown to have authorised such contracts. *Tredwen v. Bourne*, 6 M. & W. 461.; *Steigenberger v. Carr*, 3 M. & G. 191. And such shareholders are partners, and therefore liable on all customary contracts with strangers made by their agents, though there may be an agreement *inter se* not to deal on credit; unless the plaintiff knew that the goods were ordered without the authority of the defendant. *Hawken v. Bourne*, 8 M. & W. 703. The defendant may be charged as partner on proof of an admission of his interest either before or after the debt was incurred, without proving a deed of copartnership or any strict legal interest in the mine; *Ralph v. Harvey*, 1 Q. B. 845.; and the doctrine attributed to the court in *Vice v. Anson*, 7 B. & C. 409. 411., cannot, it seems, be considered as law, though the decision itself may perhaps be supported. Where the facts showed that the defendant became a shareholder on the terms that the directors should not proceed without a certain capital, and they proceeded (without the defendant's assent) before that capital was raised, the defendant was held not liable on their contract. *Pitchford v. Davis*, 5 M. & W. 2.

The participation to render the party liable must be in the profits as such. Therefore a remuneration made to a traveller, or other clerk or agent, by a portion of the sums received by or for his principal, in lieu of a fixed salary, is only a mode of payment adapted to increase or secure exertion, and does not render the party a partner. *Cheap v. Cramond*, 4 B. & A. 670. So, a person employed to sell goods, and who was to have for himself whatever money he could procure for them above a stated sum, was held not to be a co-partner. *Benjamin v. Porteus*, 2 H. Bl. 590. So, if there be an agreement between A., the owner of a lighter, and B., that B. shall work the lighter, and in consideration of the working have half the gross earnings, this is only a mode of paying wages, and not a partnership in the profits. *Dry v. Boswell*, 1 Camp. 329. So an agreement, that a sailor shall receive a certain share of the produce of the voyage in lieu of wages, does not make him a partner with the owners of the cargo. *Wilkinson v. Frasier*, 4 Esp. 182. *Mair v. Glennie*, 4 M. & S. 244. But an agreement between two persons, that one of them should make purchases of goods for the other, and in lieu of brokerage should have one third of the profits arising from the sales, and should bear a certain proportion of the losses, makes him liable as a partner as to third persons. *Per Holroyd J.*, *Smith v. Watson*, 2 B. & C. 409. A distinction has been taken between receiving a share of the profits which renders the party liable as a partner; and relying on the profits as a fund for payment, which will not have that effect. See *Grace v. Smith*, 2 W. Bl. 998.; *Ex parte Hamper*, 17 Ves. 404.; see 2 H. Bl. 236. (n), 4th ed.

Where a dormant partner quits the partnership without any public notice, he will not be liable to persons subsequently dealing with the partnership, and who were ignorant that he had ever been a partner. *Carter v. Whalley*, 1 B. & Ad. 11.; *Heath v. Sansom*, 4 B. & Ad. 172. Knowledge by a creditor of a dissolution of partnership, the transfer of his account from the old to the new firm, and his continuing to deal with the new firm, will be evidence of accepting the latter as his

debtors, and will therefore release the retiring partner. *Kirwan v. Kirwan*, 2 C. & M. 617. See *Hart v. Alexander*, 2 M. & W. 484.

Delivery to wife.] Where husband and wife live together, and goods are delivered to the wife by her order, a jury may presume the husband's assent. *Bac. Abr. Baron and Feme* (H.); 1 *Freem. Rep.* 249. (n) 2d ed. And where a husband is living in the same house with his wife, he is liable to any extent for goods which he permits her to receive there. If they are not cohabiting, then he is in general only liable for such necessities as, from his situation in life, it is his duty to supply to her. *Waithman v. Wakefield*, 1 *Camp.* 121.; *Atkins v. Curwood*, 7 C. & P. 756. Where a wife carried on business on her own account during the imprisonment of her husband; and, after his return, articles were furnished in the same business with his knowledge, he was held liable for these articles, though the invoices and receipts were made out in the wife's name. *Petty v. Anderson*, 3 *Bing.* 170. The presumption of the husband's liability may be rebutted by proof that the credit was given to her; *Bentley v. Griffin*, 5 *Taunt.* 356.; *Metcalfe v. Shaw*, 3 *Camp.* 22.; or by proof of any other circumstances negating the husband's assent; see *Montague v. Benedict*, 3 B. & C. 631.; as where the wife has a sufficient allowance from her husband, of which the plaintiff has notice. *Holt v. Brien*, 4 B. & A. 252. If the husband and wife have parted by consent, the former remains liable for necessities supplied to the latter, unless he makes her an adequate allowance; *Hodgkinson v. Fletcher*, 4 *Camp.* 70.; *Hindley v. Marquis of Westmeath*, 6 B. & C. 211. Notice of separation has been held necessary in order to exempt the husband; *Rawlins v. Vandyke*, 3 *Esp.* 250.; but see *Turner v. Winter*, *Schw. N. P.* tit. "*Baron and Feme*," l. It is a sufficient notice if the fact was notorious in the place where the parties live. *Todd v. Stokes*, 1 *Ld. Raym.* 444. And where the husband and wife had lived separate for many years, and the wife had resources of her own adequate to her situation, of which the plaintiff had notice, it was held that he could not sue the husband. *Liddlow v. Wilmot*, 2 *Stark.* 98.; see *Thompson v. Hervey*, 4 *Burr.* 2177. And, even without a knowledge of her being provided for, the creditor, if he gives credit to her, and she is in fact adequately provided for *aliunde*, cannot sue the husband. *Clifford v. Laton*, M. & M. 101. And, generally, it seems to be now decided, that if the wife is living apart from her husband, and he in fact allows her a sufficient maintenance, he is not bound by her contracts; and it is immaterial whether the trades-people had notice of that allowance or not; *Mizen v. Pick*, 3 M. & W. 491.; where Alderson B., referring to *Rawlins v. Vandyke*, says, "No doubt, according to that decision, notice would be necessary; but the question is, whether Lord Eldon meant to express what the reporter has made him say. In *Hindley v. Westmeath*, nothing is said about notice;" . . . "I do not see how notice to the tradesman can be material. The question in all these cases is one of authority. If a wife living separate from her husband is supplied by him with sufficient funds to support herself with every thing proper for her maintenance and support, then she is not his agent to pledge his credit, and he is not liable."

A husband is liable for necessities provided for his wife, pending a suit in the ecclesiastical court, and before alimony decreed, although a decree, afterwards made, directs the alimony to be paid from a date before the

time when the necessities were provided. *Keegan v. Smith*, 5 B. & C. 375. And after a divorce for adultery in the husband, and a decree of alimony, the husband is liable for necessities supplied to the wife, if he omit to pay the alimony. *Hunt v. De Blaquiere*, 5 Bing. 550. After a divorce on the ground of nullity, the liability of the husband for the debts of his late wife does not continue. *Anstey v. Manners*, Gow, 10. It seems that an express promise made by the husband to pay a debt contracted by the wife after a separation and adequate allowance, will be a ratification, and binding upon him. *Hornbuckle v. Hornbury*, 2 Stark. 177. Acc. *Harrison v. Hall*, 1 M. & Rob. 185; but see the note *ibid.* 186.

Where the wife elopes from her husband, and lives in adultery, the husband is not liable for necessities supplied to her. *Morris v. Martin*, 1 Stra. 647. And where the husband turns the wife out of doors on account of her having committed adultery under his roof, he is not liable for necessities furnished to her after the expulsion. *Ham v. Toovey*, Selw. N. P. 260. So if she elopes, though not with an adulterer, *Child v. Hardyman*, 2 Stra. 875. But if, after an adulterous elopement, he takes her back, he is liable for necessities subsequently supplied. *Harris v. Morris*, 4 Esp. 41.

Where a wife leaves her husband under a reasonable apprehension of personal violence, he is liable for necessities subsequently furnished to her. *Houlston v. Smyth*, 3 Bing. 127. So if he causelessly turns away his wife, or shuts his door against her; *Lungworthy v. Hockmore*, cited 1 Ld. Raym. 444.; *Rawlins v. Vandyke*, 3 Esp. 251.; and a notice that he will not be answerable for her debts, will not in such case relieve him from liability. *Bouillon v. Prentice*, Selw. N. P. 263.; *Harris v. Morris*, 4 Esp. 42. A husband illtreated his wife, who indicted him for the assault; a party who advanced money for the purposes of the prosecution to the attorney, without which he could not have gone on, cannot recover it from the husband as money supplied to procure her necessities. *Grindell v. Godmoud*, 5 A. & E. 755. But he is liable for the expense of articles of the peace exhibited by the wife against him, although she may have a separate maintenance. *Turner v. Rookes*, 10 A. & E. 47. It lies upon the plaintiff to show, that under the circumstances of the separation, or from the conduct of the husband, the wife had authority to bind him; and this even in an action for necessities. *Mainwaring v. Leslie*, M. & M. 18. *Clifford v. Laton*, *ibid.* 102.

The plaintiff must prove, either that the defendant and the woman to whom the goods were delivered are married, which is sufficient *prima facie* evidence of the defendant's liability, where they are living together, *Car v. King*, 12 Mod. 372., *Mainwaring v. Leslie*, *supra*, or that she and the defendant cohabited, and that she passed as his wife with his assent; and it will be no defence that the plaintiff knew her not to be his wife. *Watson v. Threlkeld*, 2 Esp. 637. *Robinson v. Nahon*, 1 Camp. 245. But this only applies while the woman assumes the defendant's name, lives in his house, and is part of his family. 2 Esp. *ubi sup.* And where the defendant has separated from a woman with whom he has lived as his wife, he is not liable for necessities subsequently supplied. *Munro v. De Chemant*, 4 Camp. 215.

Where the wife ordered goods to be delivered to her mother, saying her husband would pay for them, which he did; and she subsequently

ordered other goods in like manner, it was held that there was evidence to go to the jury of the wife being authorised to order the latte goods. *Filmer v. Lynn*, 4 Nev. & M. 559.

Where the goods were delivered after the husband's liability had been released by the wife's adultery, *semb.*, the defence may be shown under *non assumptit*. *Symes v. Goodfellow*, 4 Dowl. P. C. 642.

Delivery to infant.] The father of an infant to whom goods are supplied is only liable where an actual authority from him to his son is proved, or circumstances appear from which such an authority can be implied. *Baker v. Keen*, 2 Stark, 501. *Rolfe v. Abbott*, 6 C. & P. 286. *Quære*, Whether a father, deserting his infant child, be liable in assumptit to a party who supplies the child with necessaries, no farther proof of contract being given? Such action, at all events, cannot be maintained if the father had reasonable ground to suppose that the child was provided for. *Urmston v. Newcomen*, 4 A. & E. 899.

It appeared that the plaintiff, a tailor, furnished clothes to the defendant's son, a boy at school; that the boy when sent to the school seemed in want of clothes; that when he went home for the holidays he took the clothes in question with him, but was not wearing them; and that he returned to school with them. Defendant lived a short distance from the place where the school was, but it did not appear that he had given any direction, or made any provision for supplying his son with clothes. It was held that, on this case, there was some evidence to go to a jury of an implied authority from the father to furnish the clothes. *Law v. Wilkin*, 6 A. & E. 718.

Delivery to overseer.] Where goods were supplied for the use of the poor of the parish on orders signed by some of the overseers separately, all of whom had, on different occasions, promised to pay, this was held evidence of a joint contract, on which all the overseers were liable to be sued, including the assistant overseer who had signed. *Kirby v. Banister*, 5 B. & Ad. 1069.

Delivery to agent.] Where goods are delivered to an agent, the seller may in general sue the principal. The following has been laid down as the rule on this subject by Lord Tenterden: "If a person sells goods supposing at the time of the contract that he is dealing with a principal, but afterwards discovers that the person, with whom he has been dealing, is not the principal, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if, at the time of the sale, the seller knows that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and notwithstanding all that knowledge chooses to make the agent his debtor, then, according to the cases of *Addison v. Gandasequi*, (4 Taunt. 574.), and *Paterson v. Gandasequi*, (15 East, 62.), the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other." *Thomson v. Davenport*, 9 B. & C. 86. The mere knowledge at the time of the contract that

there is a principal, his name not being disclosed, will not prevent the seller, who has debited the agent, from afterwards resorting to the principal. *S. C. ibid.*

The members of a club managed by a committee are not, merely as such, personally liable for goods supplied on the order of the committee for the use of the club; it appearing that the committee are supplied with funds by the members who are subject only to annual subscriptions and to other ready money payments, and that the committee have no express authority to bind the members by contracts. *Fleming v. Hector*, 2 M. & W. 172. And it seems that such committees are not generally authorized to deal on credit; therefore the party who supplies goods on credit can only sue those members of the committee who were privy to the contract, unless he can prove that such dealing was one of the purposes for which the committee was appointed. *Todd v. Emly*, 7 M. & W. 427. Nor are the committee liable, as such, on the contract of their servant, the house steward; unless there be proof of an authority from them. *Todd v. Emly*, 8 M. & W. 505.

Delivery to servant.] A master is not responsible for goods ordered by his servant in his name but without his authority, unless he has been in the habit of paying for goods so ordered. *Maunder v. Conyers*, 2 Stark. 281.; *Pearce v. Rogers*, 3 Esp. 214. If in one instance the master has employed the servant to buy on credit, he will be liable for any goods which the servant subsequently buys on credit, until the credit is distinctly withdrawn; *Hazard v. Treadwell*, 1 Stra. 506.; *Rusby v. Scarlett*, 5 Esp. 76.; and see *Gilman v. Robinson*, R. & M. 227.; *Filmer v. Lynn*, 4 Nev. & M. 559., *supra*, p. 277.; though he has given the servant money to pay for the goods in some instances. *Wayland's case*, 3 Salk. 234.; *Bolton v. Hillersden*, 1 Ld. Raym. 225.; *Rusby v. Scarlett*, 5 Esp. 76. When the master gives his servant money to pay for commodities as he buys them, and the servant buys them without paying for them and embezzles the money, the master is not liable. *Stubbing v. Heintz, Peake*, 47.

Acceptance within the Statute of Frauds.] Where goods above the value of 10*l.* have been sold, and there is no note or memorandum in writing, and no earnest has been given, it frequently becomes a question, whether or not there has been a sufficient acceptance of the goods, or of part of them within the Statute of Frauds, 29 Car. 2. c. 3. s. 17. *Ante*, p. 263., *et seq.* In order to satisfy the statute, there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with the intention of taking to the possession as owner. *Phillips v. Bistolli*, 2 B. & C. 513. Acceptance without a delivery is insufficient. Thus, where the defendant ordered the goods to be marked, and to be sent to a certain place, but the plaintiff had not parted with them so as to deprive him of his lien for the price, the sale was held insufficient without a writing. *Bill v. Bament*, 9 M. & W. 36. Bulk samples were sent to the defendant by coach pursuant to the contract, but he returned them as not answering to the samples by which he bought: the jury in an action for the price of the goods found that the samples *did* answer the contract: held that there was no acceptance of the goods within the Statute of Frauds. *Johnson v. Dodgson*, 2 M. & W. 653. There is not a

sufficient acceptance, so long as the buyer continues to have a right to object either to the quantum or the quality of the goods. *Hanson v. Armitage*, 5 B. & A. 559. *Smith v. Surman*, 9 B. & C. 561. And it seems that though the purchaser has used (in the opinion of the jury) more of the goods than was necessary for the purpose of trying experiments to ascertain if they were of proper quality, that does not amount to an acceptance. *Elliott v. Thomas*, 3 M. & W. 170. Where the defendant bought of the plaintiff's agent twelve bushels of tares (part of a larger quantity in bulk), and the agent measured the twelve bushels and set them apart for the vendee to remain till called for, it was held that there was no acceptance. *Howe v. Palmer*, 3 B. & A. 321. So where A. agreed to purchase a horse from B. for ready money, and to take him within a time agreed upon, and about the expiration of that time A. rode the horse (by way of trial), and gave directions as to its treatment, &c., but requested that it might remain in B.'s possession for a further time, at the expiration of which he promised to fetch it away, and pay the price: these circumstances were held not to constitute an acceptance. *Tempest v. Fitzgerald*, 3 B. & A. 680. And when a horse was sold, and no time fixed for payment, and the horse was to remain with the vendors for twenty days without any charge to the vendee, at the expiration of which time the horse was sent to grass by the direction of the vendee, and by his desire entered as the horse of one of the vendors, it was held that there was no acceptance. *Carter v. Toussaint*, 5 B. & A. 855. So a delivery of goods to a wharfinger, who has been accustomed to forward goods from the plaintiff to the defendant, which goods are lost while in the possession of the carrier, is not an acceptance. *Hanson v. Armitage* 5 B. & A. 557. And where goods bought abroad were delivered at a foreign port on board a ship chartered by the purchaser, this was held to be no acceptance. *Acebal v. Levy*, 10 Bing. 376.; *S. C.* 4 Moore & S. 217. When the purchaser appointed the mode in which the goods should be conveyed, and directed a third person, in whose possession the goods were, to see them delivered and measured, and put up properly, these circumstances were held not to amount to an acceptance. *Astley v. Emery*, 4 M. & S. 262. The same principle was recognised in the following case: A. went to the shop of B. & Co., and contracted for the purchase of various articles, each of which was under the value of 10*l.* but the whole amounted to 70*l.* A separate price for each article was agreed upon. Some A. marked with a pencil, others were measured in his presence, and others he assisted to cut from larger bulks. He then desired that an account of the whole might be sent to his house, and went away: a bill of parcels was accordingly sent, together with the goods, which A. refused to accept. It was held that this was all one contract, and therefore within the Statute of Frauds; and that there was no acceptance of the goods to take the case out of that statute. *Baldey v. Parker*, 2 B. & C. 37. So where a hogshead of wine in the warehouse of the London Dock Company was sold for 13*l.*, and a delivery order given to the vendee, but there was no assent on the part of the Dock Company to hold the wines as the agents of the vendee, it was held that there was no actual acceptance within the statute. *Bentall v. Burn*. 3 B. & C. 423.; and see *Phillips v. Bistolli*, 2 B. & C. 511. Where goods of the value of 14*l.* were made to order, and remained in the possession of the vendor at the request

of the vendee, with the exception of a small part which the latter took away, it was held that there was no actual acceptance of these goods by the buyer within the 17th section of the Statute of Frauds, and that the plaintiff was not entitled to recover on the count for goods sold and delivered; *Thompson v. Maceroni*, 3 B. & C. 1.; but *quære*, for the statute only requires an acceptance of *part*; and this case was perhaps decided on the form of declaration, which was for *goods sold and delivered*. And see *Elliott v. Thomas*, 3 M. & W. 170. *post*, p. 281. Where A. employed B. to construct a waggon, and while it was in B.'s yard unfinished, A. employed a third person to fix upon it some iron work and a tilt; it was held that this did not amount to an acceptance; but, *per Tindal C. J.*, it might have been otherwise if these acts had been done after the waggon was completed. *Maberley v. Sheppard*, 10 Bing. 99. The traveller of A. in London having called upon B. in the country for orders, B. gave an absolute order for a quantity of cream of tartar, and offered to take a quantity of lac dye at a certain price; the traveller said the price was too low, but he would write to his principal, and if B. did not hear from him in one or two days, he might consider that his offer was accepted. A. never wrote to B., but sent all the goods; it was held that this was not a joint order for all the goods, so as to make the acceptance of the cream of tartar the acceptance of the lac dye also within the statute. *Price v. Lea*, 1 B. & C. 156.

The circumstances in the following cases were held to constitute an acceptance within the statute. The defendant bought a quantity of hay from the plaintiff, and sold it to another person, by whom it was taken away: it was held that the jury might presume an acceptance by the defendant. *Chaplin v. Rogers*, 1 East, 193. The defendant bought two horses from the plaintiff, a livery-stable keeper, and desired him to keep them at livery for him; it was held that the plaintiff, by assenting to this order and changing the stables in which the horses had been kept to his livery stables, had relinquished his lien, and that there was a constructive delivery of them to the defendant. *Elmore v. Stone*, 1 Taunt. 458. Wool, bought by defendant, was removed to the warehouse of a third person M. by his direction, and weighed and packed for him; this was held an acceptance, though the course of dealing was that it should not be taken out of M.'s warehouse till payment. *Dodsley v. Varley*, 12 A. & E. 632. Where the goods sold were in the defendant's possession at the time of the sale, a dealing with them by the defendant, and an account rendered to the plaintiffs by defendant, debiting himself with the price, are evidence of an acceptance by defendant. *Edan v. Dudfield*, 1 Q. B. 302. A. bargained for a horse then in a stable, and soon afterwards brought in a third person, and stated to him that he had bought the horse, and offered to sell it to him for a profit of 5*l.*; it was held that it ought to be left to the jury to say whether this was, or was not, a delivery and acceptance. *Blenkinsop v. Clayton*, 7 Taunt. 597.; and see *Phillips v. Bistolli*, 2 B. & C. 511. Where the purchaser of goods at the time of sale wrote his own name upon a particular article, Lord Ellenborough ruled that, if his purpose was to denote that he had purchased it, and to appropriate it to his own use, it was a sufficient acceptance within the statute. *Hodgson v. Le Bret*, 1 Camp. 233.; *Anderson v. Scot*, *ib.* 235. (n).; but see *Balday v. Parker*, 2 B. & C. 37. *anté*, p. 279. When the goods are ponderous and incapable of being handed over from one to another, there

need not be an actual delivery, but it may be done by what is tantamount ; such as the delivery of a key of the warehouse in which the goods are lodged, or by delivery of other *indicia* of property. *Per* Ld. Kenyon C. J., *Chaplin v. Rogers*, 1 *East*, 194. *Elmore v. Stone*, 1 *Taunt.* 460. A written order given by the seller of goods to the buyer, directing the person in whose care the goods are to deliver them to the buyer, is sufficient within the statute ; *Searle v. Keeves*, 2 *Esp.* 598. ; provided the person, to whom it is directed, accept the order for delivery, and assent to hold the goods as the agent of the buyer. *Bentall v. Burn*, 3 *B. & C.* 426. ; see *Salter v. Woollams*, 2 *M. & G.* 650. Where A. agreed to sell to B. twenty hogsheads of sugar then in bulk, and filled up and delivered four, and afterwards filled up the remaining sixteen, and gave notice to the defendant, who said he would take them away as soon as he could, this was held equivalent to an actual acceptance of the sixteen hogsheads. *Rohde v. Thwaites*, 6 *B. & C.* 388. When a joint order is given for several classes of goods, the acceptance of one class is a part acceptance of the whole under this section. *Elliott v. Thomas*, 3 *M. & W.* 170. The delivery of a sample, if considered to be part of the thing sold, is a sufficient acceptance ; but otherwise, where it is a sample merely, and forms no part of the bulk. *Talver v. West*, *Holt, N. P. C.* 178. ; *Cooper v. Elston*, 7 *T. R.* 14. ; *Hinde v. Whitehouse*, 7 *East*, 558. Customary forms of concluding bargains, as where the purchaser draws the edge of a shilling across the hand of the vendor, and returns the money into his own pocket, are not equivalent to earnest, or part payment within the statute. *Blenkinsop v. Clayton*, 7 *Taunt.* 597.

Where goods above 10*l.* are sent for approval, the party must object within a reasonable time, or he will be deemed to have accepted them. *Coleman v. Gibson*, 1 *M. & Rob.* 168. See *antè*, p. 270.

The defence of the Statute of Frauds is open on the plea of non-assumpsit. *Semb.* *Fricker v. Thomlinson*, 1 *M. & G.* 772.

Value.] When the goods have been sold without any agreement as to the price, their value must be proved. If the vendor of goods is only able to prove the delivery of a package without any evidence of the contents, it will be presumed as against him that it was filled with the cheapest commodity in which he deals. *Clunnes v. Pezzey*, 1 *Camp.* 8. If a seller agrees to sell a machine at a certain price and puts in materials superior to those contracted for, the purchaser is neither bound to pay a higher price, nor to return the machine. *Wilmot v. Smith*, 3 *C. & P.* 455. Where goods have been sold and delivered to be paid for by bill at a certain date, if the bill be not given, the plaintiff may recover in this action, as part of the stipulated price, interest from the time the bill would have become due. *Farr v. Ward*, 3 *M. & W.* 25.

Defence.

Evidence in reduction of damages.] It was formerly a question in this action, whether the defendant could give the bad quality of the article in evidence in reduction of the value claimed by the plaintiff.

Such evidence is clearly admissible where the plaintiff claims only on a *quantum meruit*, and no price has been agreed upon. *Basten v. Butter*, 7 *East*, 479. ; *Farnsworth v. Garrard*, 1 *Camp.* 39. And, though a dif-

ferent practice formerly prevailed, it is now held that, in all cases of goods sold at a fixed price with a warranty, or agreed to be supplied according to a special contract, it is competent for the defendant in this form of action to shew how much less the subject-matter of the action is worth by reason of the breach of warranty or contract: any further damages sustained by the defendant beyond the difference of value must be recovered in a cross action. *Mondel v. Steel*, 8 M. & W. 858. And it seems that the acceptance and non-return of the goods by the defendant will not preclude this defence, though it may be evidence in favour of the plaintiff of a fresh contract to pay on the footing of a *quantum valebant*. *Ibid.* 871. S. C.; *Groundsell v. Lamb*, 1 M. & W. 352. And the defendant may avail himself of the defence of the inferior quality or worthlessness of the goods under the plea of non assumpsit. *Cousins v. Paddon*, 2 C. M. & R. 547.; *Dicken v. Neale*, 1 M. & W. 556.

Where the contract contains a clause releasing the plaintiff from all responsibility in respect of the goods supplied after a certain time of trial, the purchaser cannot, after the time is passed, prove a latent defect in them in reduction of the price; there being no fraud alleged. *Sharp v. Great Western Railway Co.* 9 M. & W. 7.

Action brought before credit expired.] It was once doubted whether, since the New Rules, it could be shown under non assumpsit that the action had been brought before the time of credit expired. *Edmunds v. Harris*, 2 A. & E. 414. The court of Common Pleas held the evidence admissible under the plea of non assumpsit in *Gardner v. Alexander*, 3 Douk. P. C. 146.; and it has been since repeatedly so decided; *Broomfield v. Smith*, 1 M. & W. 542.; *Webb v. Fairmaner*, 3 M. & W. 473. In the last case it was held that, in calculating the time of the credit, the day of the sale must be excluded; and therefore, where goods were sold on the 5th of October to be paid for in two months, an action could not be commenced till after the expiration of the 5th of December, and a writ issued on that day was premature.

Where goods are fraudulently bought on credit, the seller cannot sue for goods sold and delivered before the credit has expired, though he may maintain trover. *Ferguson v. Carrington*, 9 B. & C. 59.; *Strutt v. Smith*, 1 C. M. & R. 312. A person purchased goods, and agreed to pay for them in three months by a bill at two months, which bill he afterwards refused to give: an action for goods sold was held not to lie till the expiration of five months. *Mussen v. Price*, 4 East, 147.; *Lee v. Risdon*, 2 Marsh. 495. So when goods are sold at six months' credit, payment to be then made by a bill at two or three months at the purchaser's option; this is in effect a nine months' credit. *Helps v. Winterbottom*, 2 B. & Ad. 431.; *Price v. Nixon*, 5 Taunt. 338. But where goods were sold at three months' credit, the vendor agreeing to take the vendee's bill at three months' date at the end of the first three months if he wished for further time; and the vendee at the end of the three months did not give such bill; Lord Ellenborough held that the vendor might bring an action for goods sold and delivered immediately. *Nickson v. Jepson*, 2 Stark. 227. And where bills, given for goods, are dishonoured, the vendor may sue for the price immediately; *Hickling v. Hardey*, 7 Taunt. 312.; *Mussen v. Price*, 4 East, 151.; provided the bills are in the hands of the seller, for if they are in the hands of third persons, that is a defence to the action; for

the defendant may be called upon by those persons to pay the bills; *Kearslake v. Morgan*, 5 T. R. 513.; *Burden v. Hallon*, 4 Bing. 455. When the buyer gives a promissory note of another person without indorsing it, the vendor may, on its dishonour, sue for the price of the goods without proving presentment to the maker, the note being produced by himself. *Goodwin v. Coates*, 1 M. & Rob. 221. So where the vendor takes a bill on a wrong stamp, in suing for the price of the goods he need not prove the dishonour of the bill. *Cundy v. Marriott*, 1 B. & Ad. 696. But if he makes a bill his own by laches, it operates in satisfaction of the preceding debt; or if he makes it his own by altering it in a material part. *Alderson v. Langdale*, 3 B. & Ad. 660. If, by the contract, it is agreed that a bill at a certain date shall be given, it operates as a giving of credit; and, although no bill should be given, the seller cannot sue the purchaser for goods sold and delivered before the period when the bill, if given, would have become due. *Mussen v. Price*, 4 East, 151.

As to the defence of illegality in this action, *vide post*, "*Assumpsit — Defence.*"

ASSUMPSIT FOR WORK AND LABOUR.

In an action for work and labour, the plaintiff's proofs are, 1. The contract, express or implied; 2. The performance of the work and labour; and 3. The value, if the remuneration is not ascertained by the contract.

The contract.] Although there be a special contract, the plaintiff is permitted in some cases to recover upon the general *indebitatus* count. And, generally, where there is a special agreement the terms of which have been performed, it raises a duty for which an *indebitatus assumpsit* will lie. *Bull. N. P.* 189.; *Robson v. Godfrey*, *Holt, N. P. C.* 237.; *Studdy v. Sanders*, 5 B. & C. 638. Whenever the duty of the defendant, arising upon the execution of the consideration, is simply to pay money, the usual and safest mode of pleading is to declare in *indebitatus assumpsit*; as in the case of goods sold, work and labour done, and other cases. *Per Park J., Streeter v. Horlock*, 1 Bing. 37. The disadvantage of suing in this form is, that the defendant will be able to shew, on the general issue, grounds of defence which would require special pleas if the plaintiff declared specially.

If there is a special agreement, and the work has been done and adopted by the defendant though not pursuant to such agreement, the plaintiff may recover upon a *quantum meruit*; for otherwise he would not be able to recover at all. *B. N. P.* 139.; *Burn v. Miller*, 4 Taunt. 745. But the defendant may refuse to take to the subject-matter of the plaintiff's work and labour where there is a deviation from the special contract; and, in such case, the plaintiff cannot recover even on a *quantum meruit*. *Ellis v. Hamlen*, 3 Taunt. 52. The plaintiff contracted to build cottages by the 10th of October, and they were not finished until the 15th; the defendant having accepted the cottages, it was held that the plaintiff might recover the value on a general declar-

ation for work, labour, and materials. *Lucas v. Godwin*, 3 *New Ca.* 737. When there is a special contract, but additional work has been done not included in it, the value of the additional work may be recovered under the *indebitatus* count, although, by reason of the stipulations as to credit, &c., the value of the work done under the special contract cannot be recovered. *Robson v. Godfrey, Holt*, *N. P. C.* 236.; *S. C.* 1 *Stark.* 275. The rule with regard to alterations made in the progress of work done under a special contract must be taken with this limitation, that the workman shall not charge for such alterations unless his employer is expressly informed, or must necessarily from the nature of the work be aware, that the alterations will increase the expense. *Lovelock v. King*, 1 *M. & Rob.* 60. Where the special contract is so entirely abandoned by consent, that it is impossible to trace it, the workman shall be permitted to charge for the whole work done by measure and value, as if no contract had ever been made; but if not wholly abandoned, the contract shall operate as far as it can be traced, and the excess only shall be paid for according to the usual rate of charging. *Pepper v. Burland, Peake*, 103. Where there is a written contract it must be produced, although the plaintiff seeks to recover for *extras* not included in it; *Vincent v. Cole, M. & M.* 257.; for the contract is the proper evidence to shew what are *extras*; *Jones v. Howell*, 4 *Dowl. P. C.* 176. In *Vincent v. Cole* it was even held that a distinct promise by the defendant to pay for the work would not supersede the production of the contract; but it was not held (though so stated in the marginal note) that an admission by the defendant, that it was *extra* the contract, was insufficient to fix him without producing the contract. Yet, as building contracts usually contain clauses as to extra works, even this admission ought not to dispense with the production, unless the defendant has also admitted that it contains no provisions for extra work. Where a man is employed to do work under a written contract, and a separate order for other work is afterwards given by parol during the continuance of the first employment, the written contract need not be produced by the plaintiff in an action for the second work. *Reid v. Batte, M. & M.* 413. A plaintiff may be prevented from recovering for extras by the form of pleading: thus where the defendant pleaded that the work was done under a special contract which was satisfied by payment, and the plaintiff traversed the payment and satisfaction, it was held that he could not recover for extras without a new assignment. *Rogers v. Custance*, 1 *Q. B.* 77.

In *Morgan v. Birnie*, 9 *Bing.* 672., giving the surveyor's certificate according to the contract in case of alterations, was held a condition precedent to the plaintiff's right to sue in respect of such alterations. But where the contract required the work to be done to the satisfaction of the defendant himself, his approval was held not to be a condition precedent. *Dallman v. King*, 4 *New Ca.* 106.

Where the defendant had contributed to the funds of a building society, and had been present at a meeting of the society, and party to a resolution that certain houses should be built, it was held that this made him liable to an action for work done in building those houses, without proof of his having an interest in them, or in the land. *Braithwaite v. Skylesfield*, 9 *B. & C.* 401. So the subscribers, who attend a committee for managing the affairs of a hospital, are personally liable to the creditors of the hospital. *Burl v. Smith*, 7 *Bing.* 705. For cases

on the personal liability of co-partners, members of clubs, shareholders, &c., see *anté*, p. 272—274, 278.

The defendant requested the plaintiff to take care of and show his (the defendant's) house, and promised to make him a handsome present: it was held that the plaintiff might recover a reasonable recompense for this work and labour; *Jewry v. Busk*, 5 Taunt. 302.; but where a person performed work for a committee under a resolution entered into by them, "that any service rendered by him should be taken into consideration, and such remuneration be made as should be deemed right," it was held that an action would not lie to recover a recompense. *Taylor v. Brewer*, 1 M. & S. 290. There is no implied assumpsit to pay an arbitrator for his trouble. *Virany v. Warne*, 4 Esp. 47.; but see *Swinford v. Burn*, Gow, 8., per Dallas C. J., *contrá*.

A master may maintain assumpsit for the work and labour of his apprentice against a person who harbours him after his desertion; for he may waive the tort, and sue on the implied contract. *Foster v. Stewart*, 3 M. & S. 191.

Under the general count for work and labour, the plaintiff may give evidence of a particular species of work and labour, e.g. as a farrier; and the medicines administered by him may be considered as materials within the count; *Clark v. Mumford*, 3 Camp. 37.; and see *Mecke v. Oxlade*, 1 N. R. 289.; but where the claim "for materials found," was omitted in the count for work and labour, it was held that the plaintiff, who sought to recover for building a house and furnishing the timber, could not recover for the latter under the count for goods sold and delivered. *Cotterell v. Apsey*, 6 Taunt. 322.; *Heath v. Freeland*, 1 M. & W. 543. The rule is thus laid down: "If you employ a man to build a house on your land, or to make a chattel with your materials, the party who does the work has no power to appropriate the produce of his labour and your materials to any other person. Having bestowed his labour at your request on your materials, he may maintain an action against you for work and labour. But if you employ another to work up his own materials in making a chattel, then he may appropriate the produce of that labour and materials to any other person. No right to maintain any action vests in him during the progress of the work; but when the chattel has assumed the character bargained for, and the employer accepted it, the party employed may maintain an action for goods sold and delivered, or (if the employer refuses it) a special action on the case for such refusal; but he cannot maintain an action for work and labour; because the labour was bestowed on his own materials, and for himself, and not for the person who employed him." *Atkinson v. Bell*, 8 B. & C. 283.; see also *anté*, p. 270, 271.

Contract. — Repairs of Ships.] Registered ownership, that is, proof of the register (*anté*, p. 85.), and that such register has been made with the assent of the parties therein named, is *primâ facie* evidence of the liability of those parties for the repairs of the ship; *Cox v. Reid*, R. & M. 199.; but such evidence may be rebutted by proof of the beneficial interest having been parted with, and of the legal owner having ceased to interfere with the management of the ship. *Jennings v. Griffiths*, R. & M. 42. *Young v. Brander*, 8 East, 10. The true question in cases of this description is, "Upon whose credit was the work done?" *Per*

Abbott C. J., *Jennings v. Griffiths*, R. & M. 43. A person who takes a share in a ship under a void conveyance is not liable for articles furnished to the ship, unless credit be given to him individually, or he holds himself out as owner. *Harrington v. Fry*, 2 Bing. 179. An undertaking by the defendant's attorney "to appear for Messrs. T. and M. joint owners of the sloop A." is evidence against the defendants of the joint ownership. *Marshall v. Cliff*, 4 Camp. 133. A part owner of a ship is not necessarily a partner; and if, as ship's husband, he has fitted her out, he may sue the other part owners separately for their share of the expense. *Helme v. Smith*, 7 Bing. 709.

Whether a mortgagee of a ship, before possession, was liable to repairs, was formerly much doubted; *Briggs v. Wilkinson*, 7 B. & C. 30.; but now, when a transfer is made only by way of mortgage, or of assignment to trustees by way of sale, on a statement being made in the book of registry and in the indorsement on the certificate of registry to that effect, the person to whom the transfer is made, or any other claiming under him, is not to be deemed the owner, nor is the person making such transfer to be deemed to have ceased to be an owner, except so far as may be necessary for the purpose of rendering the ship transferred available by sale or otherwise for the payment of the debts secured. 4 G. 4. c. 41. s. 43.; and 3 & 4 W. 4. c. 55. s. 42.

Performance.] The plaintiff must prove a performance of the work and labour according to the terms of the contract; or, if there is a deviation from those terms, an acquiescence by the defendant in the deviation, *vide supra*, p. 283, 284. Thus in an action to recover the value of a riding-habit for which the defendant's wife had been measured, but which was returned to the plaintiff on the day on which it was delivered, it was ruled to be incumbent on the plaintiff to prove that the habit was made agreeably to the order. *Hayden v. Hayward*, 1 Camp. 180. So a herald, who sues for making out a pedigree, is bound to give some general evidence of the truth of the pedigree. *Townsend v. Neale*, 2 Camp. 191. Where A., who was employed by the defendant to transport goods to a foreign market, delegated the entire employment to the plaintiff, who performed it without the privity of the defendant, it was held that the plaintiff could not recover from the defendant a compensation for such service. *Schmaling v. Thonlinson*, 6 Taunt. 147.

Value.] In what manner the value of the work is to be calculated where there is a special contract and deviations from it has been already mentioned, *antè*, p. 283, 284. Where a tradesman finishes work differing from the specification agreed on, he is not entitled to recover the actual value of the work done, but only the stipulated price minus such a sum as it would take to complete the work according to the specification. *Thornton v. Place*, 1 M. & Rob. 218.; *Chapel v. Hickers*, 2 C. & M. 214. In an action for work and labour as a surveyor or architect, the plaintiff is entitled to a reasonable compensation; and it is a question for the jury, whether the usual commission of five per cent. is, under the circumstances, a reasonable or unreasonable charge. *Chapman v. De Tastet*, 2 Stark. 294.; *Upsdell v. Stewart*, Peake, 193.

Defence.

Where the work has not been executed according to the contract, the party for whom it is executed may repudiate it, and in such case the plaintiff cannot recover. *Ellis v. Hamlen*, 3 Taunt. 52., ante, p. 283. So if the defendant has received no benefit from the work, it having been improperly executed by the plaintiff, the latter cannot recover. *Farnsworth v. Garrard*, 1 Camp. 38. ; *Montrieu v. Jefferys*, R. & M. 317. Thus an auctioneer, through whose gross negligence the sale becomes nugatory, can recover nothing for his services. *Denew v. Daverell*, 3 Camp. 451. But where the defendant has derived some benefit from the plaintiff's services, he must pay *pro tanto*. *Farnsworth v. Garrard*, 1 Camp. 38. However, in a late case where the plaintiff had contracted to repair some chandeliers for 10*l.*, and returned them incompletely repaired, in an action for work and labour it was held that, as the plaintiff had not performed his part of the contract, he could not recover anything in this form of action, though the jury found that the repairs were worth 5*l.* *Sinclair v. Bowles*, 9 B. & C. 92. Where a shipwright undertook to put a ship into thorough repair, which had put into port damaged ; and, before the work was finished, required payment for the portion done without which he refused to proceed, and the ship lost her voyage ; in an action for the work done, it was held that he was entitled to recover. *Roberts v. Havelock*, 3 B. & Ad. 404.

Defendant may shew, on the general issue, that the work was done under a special contract not executed. *Jones v. Nanney*, 1 M. & W. 333. So where A. engaged with defendant's landlord to build a house on the defendant's land, and A. made a sub-contract with the plaintiff that plaintiff should do part of the work, and defendant separately agreed to pay over to the plaintiff, directly, all money due for such part of the work upon a discharge from A., it was held that the defendant's agreement did not make him liable to plaintiff for work and labour, but only to an action on the special agreement. *Sweeting v. Asplin*, 7 M. & W. 165. Where the plaintiff agrees to do work for a certain sum on a false representation by defendant of the quantity of work to be done, he may repudiate the contract ; but if he performs it, he can only recover the stipulated sum in this action. *Schway v. Fogg*, 5 M. & W. 83.

The plaintiff declared for work and labour as an attorney, and defendant paid money into court and pleaded *nunquam indebitatus* to the residue : held, that the defendant might prove that plaintiff agreed to do the work for costs out of pocket, which did not exceed the sum paid in. *Jones v. Reade*, 5 A. & E. 529.

As to other defences to this action, see post, "*Assumpsit—Defence.*"

ASSUMPSIT FOR MONEY PAID.

The plaintiff, in an action of assumpsit for money paid to which the general issue is pleaded, must prove, 1. The payment of money by the plaintiff; 2. That it was paid at the request of the defendant and to his use.

The payment of money.] The plaintiff must prove that *money* was paid; giving a security, as a bond or warrant of attorney, is not sufficient; *Taylor v. Higgins*, 3 *East*, 169.; *Marwell v. Jamson*, 2 *B. & A.* 51.; unless, perhaps, where a bill or note is taken as payment. *Barclay v. Gooch*, 2 *Exp.* 571. So stock cannot be considered as money. *Jones v. Brinley*, 1 *East*, 1. The plaintiff must prove that the money paid was *his* money. Thus, an under-tenant, whose goods have been distrained and sold to strangers by the original landlord for rent due from his immediate tenant, cannot maintain an action for money paid to the use of the latter; for immediately on the sale under the distress, the money paid by the purchasers vests in the landlord in satisfaction of the rent, and never was the money of the under-tenant; *Moore v. Pyrke*, 11 *East*, 52.; but it is otherwise where the under-tenant redeems his goods with his own money; as in *Exall v. Partridge*, 8 *T. R.* 308.

The defendant's request.] The plaintiff must prove a request by the defendant, express or implied. *Alexander v. Vane*, 1 *M. & W.* 511. Thus if the plaintiff has paid the money without the defendant's request, though to discharge a just debt, no action will lie. *Stokes v. Lewis*, 1 *T. R.* 20. So where a broker purchases stock to fulfil a contract entered into by him for his principal, but which his principal refuses to make good, he cannot sue his principal in this action, unless he is also guarantee for his principal. *Child v. Morley*, 8 *T. R.* 614. So where the party, to whom the stock was contracted to be sold, on the defendant's refusal to transfer bought the stock himself, and brought assumpsit for money paid to recover the difference in the price of the stock, it was held, that the action could not be sustained. *Lightfoot v. Creed*, 8 *Taunt.* 268. A subsequent assent to the payment will be evidence of a previous request. 1 *Saund.* 264. (n.) 5th ed.

A payment by the plaintiff under a legal obligation will also be equivalent to a previous request; as where one person is surety for another, and is called on to pay, the money paid may be recovered, though the surety did not pay the debt by the desire of the principal. *Exall v. Partridge*, 8 *T. R.* 310. When an executor has paid legacies in full, and afterwards paid the legacy duty, it was held, in *Foster v. Ley*, 2 *New Ca.* 269., that he might recover the amount paid for duty in an action for money paid against the legatee. So where several are sureties, and one is compelled to pay the whole, he may recover from each of his co-sureties a rateable proportion of the money so paid. *Cowell v. Edwards*, 2 *B. & P.* 268.; *Deering v. Winchelsea*, *id.* 270.

A co-surety may pay the debt, when liable, without waiting for a

demand or an action, and then sue for contribution. *Pitt v. Purssord*, 8 M. & W. 538. And where two are jointly liable for expenses incurred for their common benefit, and one dies, the survivor, who pays the whole, may sue the executor of the deceased for money paid to the use of the defendant as executor. *Prior v. Hembrow*, 8 M. & W. 873.

As a general rule, this action does not lie for contribution or indemnity against a person jointly engaged with the plaintiff in doing an illegal act by which the plaintiff is put to expense. *Merryweather v. Niran*, 8 T. R. 186. But where the plaintiff was not aware that the transaction was illegal, or its nature was doubtful, he may sue on the implied contract to indemnify. *Betts v. Gibbins*, 2 A. & E. 57.; *Pearson v. Skelton*, 1 M. & W. 504.

Where one bail sues his co-bail for contribution, he must prove the judgment, as well as the execution. *Belldon v. Tankard*, 1 Marsh. 6. To support this action it must appear either that the defendant was primarily liable to the third party to pay the money, or that it was paid, or the liability incurred, by the plaintiff at his express request. It is not sufficient that he has agreed with the plaintiff to pay the money to the third party. Thus where the landlord is called upon to pay the taxes which his tenant is, by special agreement, bound to pay, he cannot sue the tenant for money paid. *Spencer v. Parry*, 3 A. & E. 331.; *Lubbock v. Tribe*, 3 M. & W. 607. An accommodation acceptor, who has defended an action on the bill at the request of the drawer, may recover the costs of such action as money paid. *Howes v. Martin*, 1 Esp. 162. So also the indorser of a bill, who has been sued by the holder and paid him part of the amount of the bill, may recover that amount in an action for money paid against the acceptor. *Pownal v. Ferrand*, 6 B. & C. 439. But he cannot recover the costs of the former action; for the custom of merchants does not make an acceptor liable for the costs of all actions against subsequent holders. *Dawson v. Morgan*, 9 B. & C. 618. A person who pays a bill for the honour of one of the parties to it may sue him for money paid. *Smith v. Nissen*, 1 T. R. 269. But he must prove that a formal protest was made before the payment. *Vandewall v. Tyrell*, M. & M. 88. Bail may recover, as money paid, the expenses incurred by them in taking their principal; but not the costs of an action against them unadvisedly defended. *Fisher v. Fallows*, 5 Esp. 171.

A notice to the party, on whose behalf an indemnity is given, is not necessary before defending an action on the guarantee; but if such notice is given, and he refuses to defend the action, he is estopped from saying that the surety was not bound to pay the money. *Duffield v. Scott*, 3 T. R. 374.; *Smith v. Compton*, 3 B. & Ad. 408. Money paid lies against a ship-owner for money supplied to the captain, either in a foreign or English port, borrowed for the necessary repairs or use of the ship. *Robinson v. Lyall*, 7 Price, 592. But only where the necessity is so pressing that the owner himself cannot be consulted without prejudice and delay. *Johns v. Simons*, 2 Q. B. 425.

Where a carrier, by mistake, delivered to B. goods sold and consigned to C., and B. appropriated the goods, and the carrier, on demand without action, paid C., it was held that the carrier might recover from B. the sum so paid as money paid to his use; *Brown v. Hodgson*, 4 Taunt. 189.; but see *Sills v. Laing*, 4 Camp. 81. Where a party is compelled to pay money in consequence of his own neglect; *Capp v. Topham*,

6 East, 392. ; or breach of duty ; *Pitcher v. Bailey*, 8 East, 171. ; the law raises no implied promise to repay him. So if the money is paid in furtherance of an illegal transaction. *Mitchell v. Cockburne*, 2 H. Bl. 379. ; *Aubert v. Maze*, 2 B. & P. 371. ; and see *post*, tit. *Assumpsit. Defence. Illegality.*

ASSUMPSIT FOR MONEY LENT.

In an action of assumpsit for money lent, the plaintiff will have to prove the loan of his money. Of this a promissory note given by the defendant to the plaintiff will be evidence. *Story v. Atkins*, 2 Stra. 719. To establish a loan, it is not sufficient merely to prove the payment of money to the defendant ; for in such case the presumption of law is that the money is paid in liquidation of an antecedent debt ; *Welch v. Seaborn*, 1 Stark. 474. ; but if the plaintiff can shew any money transactions between the defendant and himself from which a loan may be inferred, or any application by the defendant to borrow money at the time, this, coupled with the passing of the money, will be evidence of a loan. *Cary v. Gerrish*, 4 Esp. 9. The mere production by the plaintiff of an I. O. U., though not addressed to him, is evidence of money lent by him to the defendant who signed it, and if U. meant some other person, the defendant must prove this. *Douglas v. Holme*, 12 A. & E. 641. If plaintiff lends money to defendant who contracts to "repay on demand or to execute a mortgage," plaintiff may recover for money lent on defendant's refusal to execute. *Bristowe v. Needham*, 9 M. & W. 729. If a parent advances money to a child, it is presumed to be by way of gift. *Per Bayley J.*, *Hick v. Keats*, 4 B. & C. 71. As to recovering interest, see *post*, p. 297.

A lender, who has received goods as a security, may recover in an action for money lent, without proving that he has returned or tendered the goods. *Lawton v. Newland*, 2 Stark. 73.

ASSUMPSIT FOR MONEY HAD AND RECEIVED.

In an action for money had and received, the plaintiff must prove the receipt of the money by the defendant, and his own title to recover it. The plea of non assumpsit operates as a denial both of the receipt, and of the existence of those facts which make it a receipt to the plaintiff's use. *R. G. H. T. & W. 4., post*, Appendix No. I.

This action cannot be maintained if it be against equity and good conscience that the money should be recovered. Thus where A. purchased an annuity for her life, which was regularly paid up to the time of her death, but no memorial of the grant of the annuity was enrolled, it was held that A.'s executrix could not on that ground insist that the contract was void and recover back the consideration money paid for the annuity. *Davis v. Bryan*, 6 B. & C. 651.

Receipt of money.] The plaintiff must prove that money has been received; and therefore an action for money had and received will not lie to recover stock. *Nightingal v. Devisme*, 5 Burr. 2589. And it has been held that it will not lie against a finder of bank-notes, to recover their value; *Noyes v. Price*, H. 16 G. 3., *Select Ca.* 242.; *Chitty's Bills*, 426, 5th ed.; though, if not produced, the receipt of their value will be presumed; *Chitty*, *ubi sup.* citing *Longchamp v. Kenny*, 1 Doug. 138.; and the value even of provincial notes, if received as money, may be recovered in this action. *Pickard v. Bankes*, 13 East, 20.; *Fox v. Cutworth*, cited 4 Bing. 179. Where the defendant, who was sued for the proceeds of a bill of exchange, admitted that he had paid it into his banker's, and the banker's clerk was called to prove that credit was given to the defendant for the bill, it was held that this evidence was insufficient without the production of the bill. *Atkins v. Owen*, 2 A. & E. 35. The principle in all the cases is, that if a thing be received as money, it may be treated and recovered as such. *Spratt v. Hobhouse*, 4 Bing. 179. If an agent refuses to account for goods delivered to him for sale, it shall be presumed, after a reasonable time, that he has sold them and received the proceeds in money. *Hunter v. Welsh*, 1 Stark. 224.

The plaintiff must give evidence of some particular sum; otherwise he must be nonsuited. *Harvey v. Archbold*, 3 B. & C. 626.; *Bernasconi v. Anderson*, M. & M. 183.; or, at least, can only recover a nominal sum; *Leeson v. Smith*, 4 Nev. & M. 304. The drawing of a bill by the defendant on the plaintiff, who accepts and pays the holder, is not evidence of money had and received by the defendant to the plaintiff's use. *Scott v. Miller*, 3 New Ca. 811.

The plaintiff must prove that it was *his* money which the defendant received. *Scarfe v. Hallifax*, 7 M. & W. 288.

Receipt by the defendant for the plaintiff.] The plaintiff must prove that the money has been received to his use *by the defendant*. The mere bearer of money from one person to another cannot be sued. *Coles v. Wright*, 4 Taunt. 198. So an agent who has paid money over pursuant to the directions of the party depositing it with him, and without notice of the plaintiff's title, cannot be sued; but merely passing it in account is not a payment; *Buller v. Harrison*, Cowp. 565.; *Horsfall v. Handley*, 8 Taunt. 136.; and until there has been a change of circumstances by his having paid over the money to his principal, or done something equivalent to it, he remains liable. *Cox v. Prentice*, 3 M. & S. 344. So if he pays it over after notice that the right to it is disputed. *Edwards v. Hodding*, 5 Taunt. 815. A receipt, signed by an agent for his principals, is not evidence to support an action for money had and received against the agent. *Edden v. Read*, 3 Camp. 339. So where an attorney's clerk, in the absence of his master, received money due to the plaintiff, one of his master's clients, and gave a receipt, "B. for Mr. J.," and his master never returning, the clerk refused to pay over the money to the plaintiff; it was held that no action lay against the clerk, there being no privity between him and the plaintiff. *Stephens v. Badcock*, 3 B. & Ad. 354. An auctioneer is the agent of both parties, and a deposit on a sale that goes off may be recovered from him personally; but if the deposit money is paid to the vendor's solicitor, who receives it as such, the action should be brought

against the vendor and not the solicitor. *Barnford v. Shuttleworth*, 11 A. & E. 926. A person acting as a trustee (as the provisional assignee of a bankrupt) is not, in general, liable in this action for money received by an agent appointed by him with due care, and who has failed. *Raw v. Cutten*, 9 Bing. 96. Where money in litigation between two parties has by consent been paid over to a stakeholder in trust for the party entitled, it can only be recovered from the stakeholder, and not from the original debtor. *Ker v. Osborne*, 9 East, 378. In general an agent must account to his principal, and cannot set up the *jus tertii* to an action brought by him. *Nicholson v. Knowles*, 5 Mad. 47.; *Crosskey v. Mills*, 1 C. M. & R. 298.; *White v. Bartlett*, 9 Bing. 378. Where an agent receives money to pay over to a third person, he continues to be accountable to his principal until he has entered into some binding engagement with that third person to hold the money to his use; and not until then will he be liable to the third person in an action for money had and received. *Baron v. Husband*, 4 B. & Ad. 612.; *Williams v. Everett*, 14 East, 582.; *Wedlake v. Hurley*, 1 C. & J. 83.; *Brind v. Hampshire*, 1 M. & W. 365.

Failure, or want, of consideration.] Where money has been paid on a consideration which has wholly failed, it may be recovered in this action by the party who has paid it. Thus, if an annuity be defective, and the deeds are set aside, the consideration money may be recovered. *Shove v. Webb*, 1 T. R. 732. So where one of several securities, securing the annuity, fails. *Scurfield v. Gouland*, 6 East, 241. In such an action the deeds should be produced and their execution proved, and the setting them aside proved by the production of the rule of court. 2 Stark. Ev. 215 (n.), 1st ed. The receipt of the money must also be proved. The defendant in these cases may deduct the payments made by him in respect of the annuity. *Hicks v. Hicks*, 3 East, 16.; *Davis v. Bryan*, 6 B. & C. 651. Where a scheme for establishing a tontine was put forth, stating that the money subscribed was to be laid out at interest, and after some subscriptions had been paid to the directors in whom the management of the concern was vested, but before any part of the money was laid out at interest, the directors resolved to abandon the project, it was held that each subscriber might, in an action for money had and received, recover the whole of the money advanced by him, without any deduction for expenses. *Nockels v. Crosby*, 3 B. & C. 814. So the money paid for the purchase of shares in a joint stock company, may, under similar circumstances, be recovered. *Kempson v. Saunders*, 4 Bing. 5. Where a fixed sum has been paid to the parish by the putative father of a bastard, and the child dies, the residue of the sum unexpended may be recovered in this action. *Watkins v. Hewlett*, 1 B. & B. 1. And in *Chappell v. Polcs*, 2 M. & W. 867., the money was held recoverable, though the defendants (the overseers who had received the money) had handed over the money to their successors; and *semble* that the whole sum paid was money had and received to the plaintiff's use from the time it was so paid; the contract being from the beginning illegal and void. *Ibid.* If A. pays B. money to be applied to a particular purpose, which B. neglects to do, A. may recover it back in this form of action; and this, although B. alleges (but does not prove) a loss by his own negligence. *Parry v. Roberts*, 3 A. & E. 118. So where the plaintiff abandons the purpose for which money

was deposited with the defendant, he may sue for money had and received. *Baird v. Robertson*, 1 M. & G. 981.

In cases of forgery.] Where a party paying money upon a forged instrument has not been guilty of any want of that caution, which, in consequence of the character which he fills, he is bound to exercise, and has not by his conduct affected the rights of any other parties to the instrument, he may in general recover back the money paid by him, as money paid under a mistake. A person, who discounts a forged navy bill, may recover back the money, as money had and received to his use. *Jones v. Ryde*, 5 Taunt. 488., S. C. 1 Marsh. 157. So in the case of forged bank-notes. *Per Gibbs C. J.*, *ibid.* So where a banker by mistake paid a bill for the honour of a customer, whose name was forged, but, discovering the mistake, gave notice thereof to the holder in time to enable him to give notice of nonpayment to the indorsers, it was held that the money was recoverable from the holder. *Wilkinson v. Johnson*, 3 B. & C. 428. And so where the plaintiffs discounted for the defendants a bill of exchange, which the latter did not indorse, and the signatures of the drawer and acceptor (the latter of whom kept an account with the plaintiffs) were forged, it was ruled that the defendants were liable to refund the money. *Fuller v. Smith*, R. & M. 49.

But where the party paying the money ought to have ascertained, or is bound to know, that the handwriting is forged; or where, by his delay in discovering his mistake, he has deprived the holder of the means of resorting to other parties on the bill, he will not be allowed to recover. Thus where two bills were drawn upon the plaintiff, one of which he accepted and both of which he paid, and it appeared that the handwriting of the drawer was forged, it was held that it was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand, before he accepted or paid it, and that he could not recover the amount from the payee. *Price v. Neale*, 3 Burr. 1354., S. C. 1 W. Bl. 390. So where a banker paid a bill to a *bonâ fide* holder, which purported to be accepted payable at his house by one of his customers, and the forgery of the acceptor's name was not discovered until the end of a week, it was held that the money could not be recovered from the holder; *Smith v. Mercer*, 6 Taunt. 76.; and the banker in such a case cannot recover, though he gives notice of the forgery on the day after he has paid it; for the holder is entitled to know whether it is to be dishonoured, on the very day it becomes due. *Cocks v. Masterman*, 9 B. & C. 902. Where a check, drawn by a customer upon his banker for a sum of money described in the body of the check in words and figures, was afterwards altered by the holder, who substituted a larger sum for that mentioned in the check, but in such a manner that no person in the ordinary course of business could observe it, and the banker paid to the holder this larger sum, it was held that the banker could not charge his customer for any thing beyond the sum for which the check was originally drawn. *Hall v. Fuller*, 5 B. & C. 750.

Money paid under a mistake of facts or of law.] Money paid under a mistake of facts, and which the party receiving it has no claim in conscience to retain, is recoverable as money paid without consideration. *Bize v. Dickason*, 1 T. R. 285.; *Milnes v. Duncan*, 6 B. & C. 671. Where

money was paid on account, and a dispute afterwards occurred between the parties, and a balance was struck omitting to notice the sums paid, and the plaintiff paid the whole balance, he was permitted to recover the sum paid on account, as money paid under a mistake of fact in the hurry of business. *Lucas v. Worswick*, 1 M. & Rob. 293. And a payment made in *bonâ fide* forgetfulness of a fact formerly known to the plaintiff, may be recovered back. *Kelly v. Solari*, 9 M. & W. 54. And it is not enough to disentitle the plaintiff that he might have learnt the real fact upon inquiry, unless he has voluntarily waived all inquiry into the truth. *S. C. ib.* Where money is paid with a knowledge of all the facts, but under a mistake of the law, it cannot in general be recovered. *Bilbie v. Lumley*, 2 East, 469.; *Brisbane v. Dacres*, 5 Taunt. 143. Where an article is sold, which turns out to be of less value than the price given for it, the extra price, if there be no fraud, cannot be recovered back. *Per Le Blanc J., Cor v. Prentice*, 3 M. & S. 319. But if parties agree to abide by the weighing of any article at any particular scales, and, in the weighing, an error, not perceived at the time, takes place from an accidental misreckoning of some weight, and the thing is reported of more weight than it really is, and the price is paid thereupon, money had and received is sustainable. *Per Lord Ellenborough C. J., ibid.* A tenant who has paid rent to his landlord, and has afterwards been ejected by a third person who sues him for the mesne profits, and recovers for the period during which the tenant has paid his rent, may recover the rent so paid from his landlord in an action for money had and received, the landlord not having set up any title at the trial of the ejectment. *Newsome v. Graham*, 10 B. & C. 234.; see 1 *Freeman*, 479. (note d), 2d ed. After the death of a bankrupt tenant for life his assignees were allowed to recover, as money had and received, the bygone rents from a person who had received them under the colour of a fraudulent assignment. *Pearce v. Day*, cited 2 *Russ. & Myl.* 124. 481. Where plaintiff, a stock-broker, sold for defendant four Guatemala bonds, and paid him the amount, and after the bonds had been two days in the hands of the purchaser they were found not to be marketable, whereupon plaintiff took them back and reimbursed the purchaser, it was held that money had and received was maintainable at his suit, against the defendant for the amount paid by him to the defendant. *Young v. Cole*, 3 *New Ca.* 724.

As to money had and received on rescinding a contract, see "*Assumpsit on sale of real property*," *antè*, p. 193., and on "*Warranty*," *antè*, p. 248.

Money obtained by fraud or duress, &c.] Where money has been obtained by fraud or duress, this action lies to recover it; and money, fraudulently obtained, may be recovered at law, although the defendant may be entitled to it by the ecclesiastical law. *Crookford v. Winter*, 1 *Camp.* 124. So where the defendant married the plaintiff, living his former wife, and received the rents of her land, they were held recoverable in this form of action. *Hasser v. Wallis*, 1 *Salk.* 28. The defendant fraudulently colluded with J. S., who was insolvent, to obtain wines from the plaintiff, the proceeds of which eventually came into the defendant's hands in satisfaction of a debt due to him from J. S.; the plaintiff was held entitled to recover in this action. *Abbotts v. Barry*, 2 B. & B. 369.; *S. C.* 5 B. *Moore*, 98.

So where a man has been obliged involuntarily to pay money, it may be recovered in this action; as where he has paid an exorbitant sum to redeem his goods from pawn, or wrongful detention. *Astley v. Reynolds*, 2 *Stra.* 915.; *Ashmole v. Wainwright*, 2 *Q. B.* 837. Where goods not liable to seizure are seized by a revenue officer, who extorts money to release them; *Irving v. Wilson*, 4 *T. R.* 485.; or a corporation officer extorts a fee for granting a licence; *Morgan v. Palmer*, 2 *B. & C.* 729.; or a sheriff claims and receives a larger fee than he is entitled to; *Dew v. Parsons*, 2 *B. & A.* 568.; or a toll-keeper exacts an illegal toll; *Parsons v. Blandy*, *Wightw.* 22.; this action is maintainable. But generally mere duress of goods will not avoid an agreement, so as to enable a party to recover back money paid under it. See *Atlee v. Backhouse*, 3 *M. & W.* 650.; *Skeate v. Beale*, 11 *A. & E.* 983. A party cannot try a title to land in this action; as where money has been paid to release goods taken as a distress. *Lindon v. Hooper*, *Coup.* 414. And where an action is brought, and the defendant pays the demand "without prejudice," he cannot afterwards recover the money so paid. *Brown v. M'Kinnally*, 1 *Esp.* 279. So money recovered by legal process, though in fact not due, cannot be recovered by the defendant in the former action. *Marrriott v. Hampton*, 7 *T. R.* 269.; *Hamlet v. Richardson*, 9 *Bing.* 644. But where a certificated bankrupt, on being arrested upon a *ca. sa.* for a debt proveable under the commission, paid the money under a protest, stating his bankruptcy and certificate, and warning the plaintiff that he should apply to the court to have the money returned, it was held that this was not such a payment under legal process, with knowledge of the facts, as precluded the plaintiff from recovering back the money. *Payne v. Chapman*, 4 *A. & E.* 364. This action lies to recover money in the hands of an overseer, levied on a conviction which has been quashed. *Feltham v. Terry*, cited 1 *T. R.* 387. And where defendant, knowing he had no real claim, arrested the plaintiff, a foreigner, at Falmouth, on his arrival from abroad, for 10,000*l.*, and under the compulsion of a colourable legal process extorted from him 500*l.* "as a payment in part of the whole," the court of King's Bench held that this action was maintainable. *Duke de Cadaval v. Collins*, 4 *A. & E.* 858.

In cases of illegal contracts.] Where money has been paid in pursuance of an illegal contract, it is in certain cases recoverable as money had and received to the use of the party paying it. It may be recovered in the following cases. (See 1 *H. Bl.* 65. (n) 4th ed.)

1. When the contract remains *executory*, though the plaintiff and defendant be *in pari delicto*. *Tappenden v. Randall*, 2 *B. & P.* 467.; *Aubert v. Walsh*, 3 *Taunt.* 277.; *Busk v. Walsh*, 4 *Taunt.* 290.; *Lowry v. Bourdieu*, 2 *Dougl.* 468. And there is no distinction in this respect between *mala prohibita* and *mala in se*. *Aubert v. Maze*, 2 *B. & P.* 371.; *Cannan v. Bryce*, 3 *B. & A.* 179.

2. The money is recoverable, though the contract be executed, provided the plaintiff be not *in pari delicto* with the defendant. *Jaques v. Withy*, 1 *H. Bl.* 65. As where money is extorted from the plaintiff by the threat of prosecuting a penal action against him. *Unwin v. Leaper*, 1 *M. & G.* 747.; *Williams v. Hedley*, 8 *East*, 378.

3. The money is recoverable from a stakeholder into whose hands it has been paid, upon an illegal consideration *executed* by the happening of the event upon which the wager is made; provided the money has

not been paid over by the stakeholder to the other party, or provided the stakeholder has paid over the money without authority. *Cotton v. Thurland*, 5 T. R. 405.; *Bate v. Cartwright*, 7 Price, 540.; *Hastelow v. Jackson*, 8 B. & C. 221.; *Hodson v. Terrill*, 1 C. & M. 797.

4. The agent of a party to an illegal contract, who receives money under it to the use of his principal, cannot set up the illegality of the transaction to an action brought against him by his principal. *Tenant v. Elliott*, 1 B. & P. 3.; *Farmer v. Russell*, *id.* 296. But it is otherwise where the agent is also *particeps criminis*. *Semb. M'Gregor v. Lowe*, R. & M. 57.

The money is *not* recoverable where the contract is *executed*, and the plaintiff is *in pari delicto* with the defendant. *Andree v. Fletcher*, 3 T. R. 266.; *Thistlewood v. Cracroft*, 1 M. & S. 500.; *Stokes v. Twitchen*, 8 Taunt. 492. Where the plaintiff gave the defendant a bill to secure him an undue preference over other creditors of the plaintiff, and to induce him to sign a composition deed, which bill was afterwards voluntarily paid by the plaintiff, he cannot recover the amount from the defendant as money had and received. *Wilson v. Ray*, 10 A. & E. 82.

The defence of illegality cannot be set up under non assumpsit. *Martin v. Smith*, 4 New Ca. 436.

On transfer of debt by arrangement between three parties.] Where A. was indebted to B., and B. was indebted to C., and B. gave an order to A. to pay C. the sum due from A. to B., as a security, on which C. lent B. a further sum, and the order was accepted by A., it was held that, on A.'s refusal to comply with the order, C. might maintain an action for money had and received against him. *Israel v. Douglas*, 1 H. Bl. 239.; *Wilson v. Coupland*, 5 B. & A. 228.; *Walker v. Rostron*, 9 M. & W. 411. It seems, however, that the agreement must be such, that the debt due from B. to C. is thereby extinguished. *Cuxon v. Chadley*, 3 B. & C. 591. And the debt transferred must also be a demand for money had and received: for where A., being indebted to B., gave him an order upon C., his (A.'s) tenant, to pay the amount out of the next rent that would become due, and B. sent the order to C., but had not any direct communication with him upon the subject, and at the next rent day C. produced the order to A., and promised to pay the amount to B.; and upon receiving the difference between that and the whole rent, A. gave a receipt for the whole, it was held that B. could not recover the amount of the order from C., either in an action for money had and received, or upon an account stated. *Wharton v. Walker*, 4 B. & C. 163. So where an overseer stopped part of a pauper's allowance, and engaged to pay it to the pauper's landlord for his rent in pursuance of an understanding between the three, it was held that the landlord could not maintain money had and received against the overseer. *Blackledge v. Harman*, 1 M. & Rob. 344. Where, by the consent of all parties, the defendant is to pay to the plaintiff a debt due from defendant to a third person A., who is the plaintiff's debtor, it lies on the plaintiff to shew that there was, at the time of the agreement, an ascertained debt due from defendant to A. *Fairlie v. Denton*, 8 B. & C. 395. The purchaser of an estate agreed with the vendor, that if the latter would pay the whole expense of another transaction, he (the vendor) should not pay any part of the expenses of the conveyance (which were equally payable by the vendor and vendee): it was held

that the money, thus set off between the vendor and the vendee, might be recovered by the attorney, who prepared the conveyance, as money had and received by the vendee to his use. *Noy v. Reynolds*, 1 A. & E. 159.

In case of partnership.] Where two persons agree to divide the profits of an agency between themselves, and one of them receives, on account of such agency, a certain sum of money, the other cannot maintain this action for a moiety, it being a partnership transaction, and there being no account settled. *Bovill v. Hammond*, 6 B. & C. 149. A transaction between partners may, however, by agreement, be so separated from the partnership affairs, though arising out of them, as to form the subject of an action by one against another. See *Jackson v. Stopherd*, 2 C. & M. 361.; *Coffee v. Brian*, 3 Bing. 54.; *Pearson v. Skelton*, 1 M. & W. 504.

ASSUMPSIT FOR INTEREST.

Great doubts formerly existed with regard to the recovery of interest in certain cases ; for the removal of which, provision was made by the 28th and 29th sections of the 3 & 4 W. 4. c. 42., by which it is enacted, that upon all debts or sums certain payable at a certain time or otherwise, the jury on the trial of any issue, or any inquisition of damages, may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment ; provided that interest shall be payable in all cases in which it is now payable by law.

And by section 29. it is enacted, that the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure in all actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in all actions on policies of assurance made after the passing of this Act.

As the 28th section of the above statute only relates to money payable at a certain time, or where a demand has been made in writing, it will be necessary to retain the former decisions on this subject.

When due at common law.] The principle upon which interest is claimed is, that it is matter of contract, express or implied, between the parties. "It is now established as a general principle that interest is allowed by law only upon mercantile securities ; or in those cases where there has been an express promise to pay interest ; or where such promise

is to be implied from the usage of trade or other circumstances." *Per* Abbott C. J., *Higgins v. Sargent*, 2 B. & C. 349.; *Page v. Newman*, 9 B. & C. 381.

Many former cases were at variance with the rule as above stated. See *Foster v. Weston*, 6 Bing. 714.; *Arnott v. Redfern*, 3 Bing. 359. Thus it was held that interest was payable on a sum awarded to be paid on a certain day. *Pinhorn v. Tuckington*, 3 Camp. 468.; and see *Swinford v. Burn, Gow*, 9. In *Chalie v. Duke of York*, 6 Esp. 46., which was an action for goods sold and delivered, Lord Ellenborough said, that the mere settling the balance did not entitle the party to interest from that time, nor was he so entitled unless the time was fixed for the payment of the money, from which time only interest could be claimed. See also *Blaney v. Hendricks*, 2 W. Bl. 761.

[In case of mercantile instruments.] The mercantile instruments which carry interest are, Bills of Exchange and Promissory Notes. Where the bill or note is expressly made payable with interest, it is payable from the date; if it is silent about interest, it is payable only from the time when the bill or note becomes due. *Orr v. Churchill*, 1 H. Bl. 227.; *Roffey v. Greenwell*, 10 A. & E. 222. Upon a bill or note payable on demand, generally, not specifying interest, interest is given from the time of the demand proved. *Blaney v. Hendricks*, 2 W. Bl. 761. And, when no demand is proved, from the issuing of the writ. *Pierce v. Fothergill*, 2 New Ca. 167. Against the drawer of a bill interest is only recoverable from the time of his receiving notice of dishonour. *Walker v. Barnes*, 5 Taunt. 240.; *S. C.* 1 Marsh. 36. It is said by Bayley J. that, in an action on a bill, as the interest is in the nature of damages, the jury may allow such rate of interest as they think proper, or may disallow it in case they are of opinion that the delay of payment has been occasioned by the default of the holder. *Cameron v. Smith*, 2 B. & A. 308.

When goods are sold to be paid for by bill, interest from the time when the bill would have become due may be recovered as part of the price in *indebitatus assumpsit* for goods sold and delivered. *Farr v. Ward*, 3 M. & W. 25.; *Davis v. Smyth*, 8 M. & W. 399. In other cases interest is not recoverable, as such, on the common counts for goods sold, money paid, &c., except by virtue of the above stat. 3 & 4 W. 4. c. 42. See *Walker v. Constable*, 1 B. & P. 306.; *Fruhling v. Schroeder*, 2 New Ca. 77.; but see *Maberley v. Robins*, 5 Taunt. 625.

[In case of implied promise.] A promise to pay interest may be implied from the acts of the parties. Thus where a balance has been settled upon an allowance of interest in a banker's book, that is an admission by the party of a contract to pay interest on the sums advanced to him by the banker. *Calton v. Bragg*, 15 East, 228. But where the defendant undertook to transfer to plaintiff's account a sum due from defendant to A., plaintiff cannot recover interest on it merely because interest was allowed in the usual course of dealing between defendant and A. *Fruhling v. Schroeder*, 2 New Ca. 77. Compound interest is not generally allowed unless the parties have contracted to pay it. Even where the defendant contracted to pay money by certain instalments, and also interest on each instalment from the day appointed to pay it, and to secure payment of such interest by his bond, it was held that, on de-

fault of payment, a jury was not bound, either at common law or under stat. 3 & 4 W. 4. c. 42. s. 28., to award interest upon such interest. *Attwood v. Taylor*, 1 M. & G. 279. So where the plaintiffs had acted as agents for the defendant, and had advanced monies, and at the close of each account, which was delivered annually, had charged interest, and at each rest had added the interest of the preceding year to the principal, Lord Ellenborough held that the accounts, which had not been objected to for a number of years, afforded evidence of a promise to pay interest in this manner. *Bruce v. Hunter*, 3 Camp. 467. But where compound interest is charged, it must appear that the party knew that the practice was to make such rests. *Moore v. Voughton*, 1 Stark. 487.; and see *Dawes v. Pinner*, 2 Camp. 486. (n).

Where interest is not allowed at common law.] The following cases must now be considered as subject to the provisions of the 3 & 4 W. 4. c. 42., already stated.

It has been held that interest cannot be recovered on money received to the use of another; *De Havilland v. Bowerbank*, 1 Camp. 50.; though the money was obtained by fraud; *Crockford v. Winter*, 1 Camp. 129.; nor for money lent, to be repaid either upon demand or at a given time; *Calton v. Bragg*, 15 East, 224.; *Higgins v. Sargent*, 2 B. & C. 351.; nor where the borrower by a written instrument promised to repay it at a certain time; *Page v. Newman*, 9 B. & C. 378.; nor on money paid; *Carr v. Edwards*, 3 Stark. 132.; nor on money due for work and labour; *Trelawney v. Thomas*, 1 H. Bl. 303.; nor on money due for goods sold and delivered, to be paid for on a certain day; *Gordon v. Swan*, 12 East, 419.; *S. C.* 2 Camp. 429. (n); nor upon a policy of insurance; *Kingston v. McIntosh*, 1 Camp. 518.; nor upon a policy of insurance on a life, where the money was payable six months after proof of the death; *Higgins v. Sargent*, 2 B. & C. 348.; nor on a single bond; *Hogan v. Page*, 1 B. & P. 337.; nor on rent; *per Tindal C. J.*, *Foster v. Weston*, 6 Bing. 714.; nor on an instrument "to pay 1500*l.* to be delivered in goods by three payments of 500*l.* each, at three, five, and seven months." *Foster v. Weston*, 6 Bing. 709. An auctioneer employed to sell an estate, who receives a deposit from the purchaser, is a mere stakeholder, liable to be called upon to pay the money at any time; and therefore, although he may make interest by it, he is not liable to pay it to the vendor on the completion of the contract. *Harington v. Hoggart*, 1 B. & Ad. 577. The indorsee of a bill may sue the acceptor for interest, although he has taken another bill from the defendant for the amount of the first, which has been duly paid. *Lumley v. Musgrave*, 4 New Ca. 9.

Where interest was payable on money had and received in consequence of a specific agreement, it was held (before the late statute) that the plaintiff might recover the interest on an *indebitatus* count for interest without declaring on the special agreement. *Hicks v. Mareco*, 5 C. & P. 498.

ASSUMPSIT ON AN ACCOUNT STATED.

To recover upon the count on an account stated, the plaintiff must prove an absolute acknowledgment by the defendant of the plaintiff's claim; a qualified acknowledgment is not sufficient, as, "I would have paid you if you had not removed the grates." *Evans v. Verity*, R. & M. 239. And where the plaintiff claimed 40*l.* and the defendant offered 17*l.* to purchase peace, it was held that this was not evidence on the account stated. *Wayman v. Hilliard*, 4 Moore & P. 729., S. C. 7 Bing. 101. An entry in a bankrupt's examination of a certain sum being due to A., is evidence of an account stated between them. *Eicke v. Nokes*, 1 M. & Rob. 359. An oral admission of a debt due for goods sold is evidence of an account stated, though the agreement for the sale was in writing. *Newhall v. Holt*, 6 M. & W. 662. And an agreement by a member of a company to pay the plaintiff's bill, is evidence of account stated, though the defendant became a member after the debt was incurred. *Barker v. Birt*, 10 M. & W. 61. Where a party, examined before commissioners of bankrupt, admitted that he had received a sum of money on account of the bankrupt after an act of bankruptcy, but not that it was a subsisting debt, it was held that this would not support a count on an account stated with the assignees. *Tucker v. Barrow*, 7 B. & C. 623. Unless the defendant has admitted the amount of the debt, it must be proved *aliunde*. *Dickson v. Deveridge*, 2 C. & P. 109.; *Leeson v. Smith*, 4 Nev. & M. 304. For the plaintiff must prove the precise sum due. *Kirton v. Wood*, 1 M. & Rob. 253. In an action by the plaintiff as executrix, where the defendant, on being applied to by her for the payment of interest, stated that he would bring her some, it was held that though this was an admission that something was due, still, as it did not appear what the nature of the debt was, nor whether it was due to the plaintiff as executrix, or in her own right, nor that it was one for which assumpsit would lie, the plaintiff was not entitled to recover even nominal damages. *Green v. Davies*, 4 B. & C. 235.; *Bernasconi v. Anderson*, M. & M. 183.; *Teal v. Auty*, 2 B. & B. 101. If it appears that the account is stated of a debt due from a third person to the plaintiff, and which defendant promised to pay without any consideration, this is a defence on the general issue. *French v. French*, 2 M. & G. 644. It is sufficient to prove the account stated, without giving evidence of the several items constituting the account; *Bartlett v. Emery*, 1 T. R. 42. (n); and proof of one item is sufficient to maintain the count. *Higmore v. Primrose*, 5 M. & S. 65. Where a partnership has been dissolved and a balance struck between the partners, and there has been a promise to pay such balance, it may be recovered under this count even as between partners; *Foster v. Allanson*, 2 T. R. 479.; *Brierly v. Cripps*, 7 C. & P. 709.; and it is maintainable even without any express promise; *Wray v. Milestone*, 5 M. & W. 21.; but such action will only lie on a final balance of the partnership accounts, and not during the continuance of the partnership; *Fromont v. Compeland*,

2 Bing. 170.; *Goddard v. Hodges*, 1 C. & M. 37.; *Wilson v. Cutting*, 10 Bing. 436.

The plaintiff may recover on an account stated in fact by the defendant with his (the plaintiff's) wife; but not on an account stated by the wife of the defendant; *B. N P.* 129.; unless she is proved to be the defendant's agent in the transaction. An acknowledgment in a casual conversation with a stranger is not sufficient. *Breckon v. Smith*, 1 A. & E. 488. Where there were accounts between A. and B.; and C. became a partner with B., and dealings continued between the partners and A., who afterwards settled an account with B. and C., wherein was included the money due from A. to B. alone, Lord Kenyon held that the whole might be given in evidence in an action by B. and C., on a count on an account stated. *Moore v. Hill, Peake, Ev.* 273. 4th ed.; see *Gough v. Davies*, 4 Price, 214; *David v. Ellice*, 5 B. & C. 196. An account stated was formerly considered conclusive; but errors which may have crept into the account, may now be corrected; *Trueman v. Hurst*, 1 T. R. 42.; but see *Roper v. Holland*, 3 A. & E. 99. And this, under the plea of non assumpsit. *Thomas v. Hawkes*, 8 M. & W. 140.

If the defendant accounts with the plaintiff in a particular character, he will be taken to have admitted that character. *Peacock v. Harris*, 10 East, 104.

A promissory note, not properly stamped, cannot be given in evidence as an admission by the maker of an account stated. *Green v. Davies*, 4 B. & C. 235. But, if admitted, it will be evidence of an account stated at the time of the date, and, in answer to a plea of the Statute of Limitations, will shew that the cause of action did not accrue till the time at which it is payable. *Wheatley v. Williams*, 1 M. & W. 533. A note, payable on a contingency, is not evidence of an account stated. *Morgan v. Jones*, 1 C. & J. 162.

The account must be stated before the commencement of the action; and where a defendant after action brought had offered a cognovit, it was held no evidence to support the count. *Spencer v. Parry*, 3 A. & E. 331.; *Allen v. Cook*, 2 Dowl. P. C. 546.

The plaintiff cannot, under this count, give evidence of more than one accounting. It is not like a count for goods sold, which may have been at several different times. *Per Littledale J., Kennedy v. Withers*, 3 B. & Ad. 769. And where the plaintiff relies on an account stated on one day, the defendant cannot prove, under the general issue, a subsequent accounting, including fresh items, by which the balance was turned against the plaintiff: for this amounts to payment or set-off. *Fidgett v. Penny*, 1 C. M. & R. 108. But it should seem that if the second accounting was a mere correction of the first, it would be admissible in defence. See *suprà*.

Where accounts are submitted to an arbitrator, not by bond, his award may be given in evidence under the count on an account stated. *Keen v. Batshore*, 1 Esp. 194. And where an incoming tenant agrees to take fixtures at a valuation to be made by two brokers, and such valuation is made, and the tenant enters, the value of the fixtures may be recovered on such a count. *Salmon v. Watson*, 4 B. Moore, 73.

An infant cannot state an account; but he may ratify one after full age. *Williams v. Moor*, 11 M. & W. 256.

DEFENCE IN ASSUMPSIT.

Plea in Abatement.

Upon issue taken on a plea in abatement, the plaintiff must be prepared to prove the amount of his damages ; otherwise, though the issue be found for him, he will only be entitled to nominal damages. *Weleker v. Le Pelletier*, 1 Camp. 481. It has been already stated which party has a right to begin, where issue is joined upon a plea in abatement. "*Course of evidence and practice*," *anté*, p. 178.

Plea of nonjoinder of co-contractor.] The following alterations, among others, with regard to the pleading of the nonjoinder of a co-contractor in abatement have been introduced by the statute 3 & 4 W. 4. c. 42.

By section 10. it is enacted, that in all such cases in which, after plea in abatement, the plaintiff shall, without having proceeded to trial upon an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded and the person or persons named in such plea in abatement as joint contractors, if it shall appear by the pleadings in such subsequent action, or on the evidence at the trial thereof, that all the original defendants are liable, but that one or more of the persons named in such plea in abatement, or any subsequent plea in abatement, are not liable as a contracting party or parties, the plaintiff shall nevertheless be entitled to judgment, or to a verdict and judgment, as the case may be, against the other defendant or defendants who shall appear to be liable ; and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same as costs in the cause against the defendant or defendants who shall have so pleaded in abatement the nonjoinder of such person ; provided that any such defendant, who shall have so pleaded in abatement, shall be at liberty on the trial to adduce evidence of the liability of the defendants named by him on such plea in abatement.

Where one of several joint contractors is an infant, he ought not to be joined as defendant, and if the defendant pleads his nonjoinder in abatement, the plaintiff may reply the infancy of the co-contractor. *Burgess v. Merrill*, 4 Taunt. 468. But where, instead of replying the infancy, the plaintiff replied that the contract was made by the defendant solely, the court of Common Pleas held that the plea was supported by evidence that the promise was made by the defendant and the infant jointly ; on the ground that the contract was not void as to the infant, but voidable only. *Gibbs v. Merrill*, 3 Taunt. 307. It has indeed been said that a contract by an infant for goods for the purpose of trade is void and not merely voidable ; *Thornton v. Illingworth*, 2 B. & C. 826. ; but, *semble*, since the new rules of pleading, infancy must be specially replied, whether the contract be void or voidable.

Where the parties sought to be joined are not general partners, but joint contractors in the transaction in question only, evidence must be given to shew that the plaintiff knew that he was dealing with all of them. And where the parties are not merely joint contractors, but general partners, though one partner has authority to bind the others in matters relating to the partnership, yet if the contract is made by the defendant alone, and the plaintiff is not aware that he is dealing with the partnership, the nonjoinder cannot be pleaded in abatement. *Mullett v. Hook*, M. & M. 88.; *Doo v. Chippenden*, *Abbott on Shipping*, 76, 5th ed.; *Baldney v. Ritchie*, 1 Stark. 338.; but see *Dubois v. Ludert*, 5 Taunt. 609. In order, therefore, to support the plea in abatement in such case, it must be shewn that the plaintiff knew that he was dealing with the partnership. Proof that the transaction took place at the office of the partnership; that the defendant and his partners publicly held themselves forth as partners in such transactions; or that the plaintiff had previous dealings with the partnership, will be evidence in support of the plea. On the other hand, any acts of defendant from which it can be inferred that he treated the transaction as several and not joint, will be evidence for the plaintiff. As where the defendant had alone corresponded with the plaintiff and promised to pay the debt, this was held to entitle the plaintiff to a verdict, though the defendant proved that he had two partners resident abroad. *Murray v. Somerville*, 2 Camp. 99. (n).

There are many cases in which either a party, entering into a contract in his own name on behalf of others, may be sued himself, or those for whom he contracted may be sued. *Hall v. Smith*, 1 B. & C. 407. Thus where a promissory note began, "I promise to pay," and was signed "For W. S., W. P. S. &c. William Smith," and William Smith pleaded in abatement the nonjoinder, on which issue was taken; it was held that the issue was rightly found for the plaintiff. *Ibid.*; *March v. Ward, Peake*, 130.; *Clerk v. Blackstock, Holt*, N. P. C. 474.

[*Competency of witness, &c.*] Even before the late statute for the removal of incompetency, it was held that where the plea states that the promises were made jointly with A. B., the plaintiff may call A. B. to disprove it; since, if the plaintiff recovered, A. B. would be liable to contribution, and the verdict in the action pending would not be evidence for him in an action for contribution. *Cosham v. Goldney*, 2 Stark. 414. But he was held incompetent for the defendant, since his evidence would go to discharge himself from contribution, and from his share of the costs. *Hare v. Munn*, M. & M. 241. (n); *Evans v. Yeatherd*, 2 Bing. 133. But as he cannot be made contributory without using the record in evidence against him, it seems that he is rendered competent by 3 & 4 W. 4. c. 42. ? The declarations of the party named in the plea, made before action brought, are admissible for the defendant. *Clay v. Langslow*, M. & M. 45.

On issue joined on a plea in abatement the plaintiff may shew that the action against the party not joined is barred by Statute of Limitations. See 9 G. 4. c. 14. s. 2., cited post, *Assumpsit. Defence. Stat. Limitations.*

Plea of Non assumpsit.

The law with regard to the evidence which may be received under the plea of *non assumpsit* has been materially altered by the general rules of H. T. 4 W. 4. These rules will be found, at length, in the Appendix I.; and the decisions upon them, as applied to certain actions of assumpsit, have been already noticed.

The principal provisions of the new rules, as applied to this form of action, are,—

(1.) In all actions of assumpsit, except on bills of exchange and promissory notes, the plea of *non assumpsit* operates only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law.

(2.) In every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law on the ground of fraud or otherwise, shall be specially pleaded; *ex. gr.* infancy, coverture, release, payment, performance, illegality of consideration either by statute or common law, drawing, indorsing, accepting, &c., bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, *déviatio*n, and various other defences, must be pleaded.

Where the plaintiff declares in *indebitatus assumpsit* defendant may shew a partnership in the transaction between himself and plaintiff on this plea. *Pearson v. Skelton*, 1 M. & W. 504. And in *indebitatus assumpsit* by one shipowner against another for contribution to damages recovered from the plaintiff for the loss of goods of a third party, the defendant may shew that the loss was owing to the plaintiff's negligence. *Gregory v. Hartnoll*, 1 M. & W. 183. And where plaintiff declares on a special contract, defendant may shew want of consideration under this plea. See *Passenger v. Brookes*, 1 New Ca. 587. *contra*, explained in *Bennion v. Davison*, 3 M. & W. 183.; *Raikes v. Todd*, 8 A. & E. 854. A contract inconsistent with the one declared on may also be proved; *Morgan v. Pebrer*, 3 New Ca. 457.; or a contract with a material provision not mentioned in the one stated by the plaintiff. *Nash v. Breeze*, 11 M. & W. 352.

Accord and Satisfaction.

Accord and satisfaction might formerly have been given in evidence under the general issue; *Paramour v. Johnson*, 12 Mod. 377.; but it must now be pleaded, and the evidence required in support of it depends on the allegations in the plea, and on the issue arising upon the replication to it.

The defendant pleaded the pendency of certain disputes, and an agreement respecting them by plaintiff and defendant entered into in satisfaction, &c.; the plaintiff denied the agreement; held, on issue joined, that the pendency of the disputes was admitted on the record. *Hcy v. Moorhouse*, 5 New Ca. 52. The acceptance in satisfaction, as well as the receipt by the plaintiff, must be shewn. Thus if the plaintiff received a

bill from the defendant given in satisfaction, it is not enough, that he *ought* in the ordinary course of dealing to have accepted it in discharge, if he did not in fact do so. *Hardman v. Bellhouse*, 9 M. & W. 596. An agreement by the plaintiff to give up his right to money in the defendant's hands on receiving an indemnity from a third person, and a receipt accordingly, is in the nature of an accord and satisfaction, and should therefore be pleaded specially. *Alexander v. Strong*. *Ibid.* 733. A plea that plaintiff drew and defendant accepted a bill for 60*l.* in satisfaction, is not supported by proof that defendant at the plaintiff's request sent to plaintiff a blank acceptance for 60*l.*, which plaintiff altered to 46*l.* before he signed it. *Baker v. Jubber*, 1 M. & G. 212. Mere lapse of time (even twenty years) is not *per se* evidence of a special contract performed by way of accord and satisfaction. *Siboni v. Kirkman*, 1 M. & W. 418. S. C. in error, 4 Id. 339.

Coverture.

The coverture of the plaintiff or defendant at the time of the contract entered into was formerly a good defence under the general issue ; but it must now be pleaded specially.

In some cases a married woman has been allowed to be sued as a feme sole. If the wife of a foreigner, resident abroad, live and trade here as a feme sole, she may be sued as such. *De Gaillon v. L'Aigle*, 1 B. & P. 357. And where a French emigrant left his wife in this country, and resided himself abroad, Lord Kenyon held that this was tantamount to an abjuration of the realm in a native, and that the wife might be sued as a feme sole. *Walford v. Duchess de Pienne*, 2 Esp. 554.; *Franks v. Same*, *Id.* 587. But in a similar case Lord Ellenborough held that the wife was not so liable, and the court of King's Bench concurred in that opinion. *Kay v. Duchess de Pienne*, 3 Camp. 123. A feme covert living apart from her husband, and having a separate and sufficient maintenance, cannot be sued as a feme sole. *Marshall v. Rutton*, 8 T. R. 545. Nor can the wife of an Englishman who is resident abroad be so sued. *Marsh v. Hutchinson*, 2 B. & P. 226.; *Stretton v. Busnach*, 1 New Ca. 139.; and see *Boggett v. Frier*, 11 East, 301. Even a divorce *à mensâ et thoro* for adultery does not so far destroy the relation of husband and wife as to render the latter liable as a feme sole. *Lewis v. Lee*, 3 B. & C. 291. But after a divorce *ab initio*, the wife becomes a single woman by operation of law, and it is the same as if she had always remained single. *Anstey v. Manners*, Gow, 11. So where the husband has abjured the realm ; *Lean v. Schutz*, 2 W. Bl. 1195., *Lewis v. Lee*, 3 B. & C. 297.; or been transported for a limited period, in which case the wife is to be considered as a feme sole. *Carrol v. Blencow*, 4 Esp. 27. It may be doubted whether, in some of the above cases, a special replication be not necessary. In *Ganer v. Lanesborough*, Peake, 17., where the defendant pleaded coverture, Lord Kenyon C. J. held that the plaintiff might prove, on a traverse of the plea, that the supposed husband had a former wife living.

Where coverture is the defence, the defendant may prove her marriage by a copy of the register, with proof of identity, *antè*, p. 84., or by the usual presumptive evidence of marriage, reputation, and cohabitation. *Kay v. Duchess de Pienne*, 3 Camp. 123.; *Birt v. Barlow*,

1 Doug. 171. And she must shew that her husband was living at the time of the debt contracted: if she shews him to have been alive within seven years it will be sufficient. *Hopewell v. De Pinna*, 2 Camp. 113. The defendant is not estopped by her previous admissions and acts as a feme sole from shewing her coverture. *Davenport v. Nelson*, 4 Camp. 26. Where the defendant set up the coverture of the plaintiff, Lord Ellenborough held that mere acknowledgment by the plaintiff, and the person alleged to be the husband, of their marriage, without actual proof of the marriage, or cohabitation, were insufficient to prove the coverture. *Wilson v. Mitchell*, 3 Camp. 394.

Fraud.

The proof of fraud in the party seeking to enforce a contract is a good defence; but, by the new rules, it must be specially pleaded. The fraud necessary to maintain a general plea of fraud and covin must be some concealment or deception practised by the plaintiff with respect to the very transaction in question. The illegality of the transaction, by reason of usury or other causes, is not sufficient. *Green v. Gosden*, 3 M. & G. 446. But a false statement to the defendant of the state of accounts between plaintiff and their debtor will prove the allegation of fraud in action against the defendant as surety for the debtor. *Stone v. Compton*, 5 New Ca. 142. Where the owner of a house sued defendant for not taking a house according to agreement, it was held (Lord Abinger C. B. *dissentiente*), that the plea of fraud was not supported by proof that the plaintiff's agent had denied the existence of a nuisance of which he was himself ignorant, but which the plaintiff himself knew of: for though this was a misstatement, it was no fraud. *Cornfoot v. Fowke*, 6 M. & W. 358. And it has been said that fraud in this plea means moral fraud, and not merely a false statement made in ignorance; *Moens v. Heyworth*, 10 M. & W. 147.; where, however, there was a difference of opinion among the judges on this point. The fraud may be passive, as by permitting a party to labour under error. Thus where the defendant erroneously supposed that a picture had been in the possession of Sir F. Agar, and purchased it from the agent of the plaintiff, who was aware of the defendant's error, but did not undeceive him, Lord Ellenborough held that the plaintiff could not recover the sum for which the picture was sold, the price being probably enhanced by the error. *Hill v. Gray*, 1 Stark. 434. So where a vendor permits the vendee to buy under a false representation by a stranger. *Pilmore v. Hood*, 5 New Ca. 97. So where goods are falsely described as "the property of a gentleman deceased," or "to be sold by executors;" for such property is likely to be sold without reserve. *Per* Lord Mansfield, *Bezwil v. Christie*, Cowp. 395. So where, at a sale by auction, the owner of the goods employs puffers to bid for him, and the buyer has no notice of such appointment, it is a fraud, and the seller cannot recover the price. *Crouder v. Austin*, 3 Bing. 368.; *Wheeler v. Collier*, M. & M. 126. But it must be pleaded specially. *Icely v. Grew*, 6 C. & P. 671.

Frauds, Statute of.

It may be shewn, under the general issue, that the contract on which the defendant sues cannot be enforced for want of a sufficient memorandum in writing. *Eastwood v. Kenyon*, 11 A. & E. 438. And this has been ruled in the case of special, as well as indebitatus, assumpsit.

Illegality.

Where a contract is illegal or immoral, it cannot be enforced, and proof of its illegal or immoral nature will be a defence to the action; but such defence must now be specially pleaded. *Potts v. Sparrow*, 1 New Ca. 594. In an action for goods sold, the defence, that the sale was an illegal one of fireworks contrary to 9 & 10 W. 3. c. 7., is not open on the general issue, though it appears on the plaintiff's evidence. *Fenwick v. Laycock*, 1 Q. B. 414. So the objection of illegality cannot be taken at Nisi Prius without a special plea, even where it appears on the declaration and is therefore ground for arresting judgment. *Daintree v. Hutchinson*, 10 M. & W. 85.

Some cases of illegality have been already stated under the head of "money had and received," *anté*, p. 295.; but the facts are now to be stated specially on the record, and the issues joined sufficiently point out the required evidence: yet, as the new rules of pleading do not apply to replications (*Brown v. Daubeny*, 4 Dougl. P. C. 585.), the question of illegality may still arise at Nisi Prius without appearing on the record; as in answer to a plea of set-off, &c. The cases on this head of evidence have therefore been retained.

In an action for work and labour, the illegality of the transaction will be a defence. A party will not be permitted to recover either for work and labour done, or materials provided, where the whole combined forms one entire subject-matter, made in violation of the provisions of an act of parliament. *Bensley v. Bignold*, 5 B. & A. 335. Thus a printer who makes a false affidavit that he is sole proprietor of a paper, cannot sue the real proprietors for the printing, or for any matter connected with its circulation. *Stephens v. Robinson*, 2 C. & J. 209.; and *stat.* 38 G. 3. c. 78. s. 2. And the proprietor of a newspaper cannot, before the filing of the affidavit directed by the statute, recover upon a contract for the printing of the paper. *Houstoun v. Mills*, 1 M. & Rob. 325. So the printer of an immoral and libellous book cannot maintain an action for his bill against the publisher who employed him. *Popplett v. Stockdale*, R. & M. 337.; and see *Coates v. Hatton*, 3 Stark. 61. A promise to indemnify the plaintiff, in consideration of the plaintiff having published a libel and defended an action brought against him for that libel at the defendant's request, is void. *Shackell v. Rosier*, 2 New Ca. 634. So a person who has expended money for the purposes of an unlicensed theatre cannot recover against another, at whose request he expended the money and who participated in the profits. *De Begnis v. Armistead*, 10 Bing. 107., S. C. 5 Moore & S. 519. So money deposited with an agent, and expended by him in illegal disbursements, cannot be recovered from him by his principal, if the principal was at the time aware of the illegal disbursements, or assented to them. Payment by a candidate, at an election for members of par-

liament, of the expenses of taking up the freedom of his voters, is illegal; and *semble*, it is also illegal to pay the travelling expenses of voters. *Bayntun v. Cattle*, 1 M. & Rob. 265. A broker cannot maintain an action for work and labour and commission for buying and selling stock, &c. unless duly licensed by the mayor and aldermen of the city of London, pursuant to 6 Anne, c. 16. *Cope v. Rowlands*, 2 M. & W. 149. Money lent for the purpose of gaming and of playing at an illegal game, such as hazard &c., cannot be recovered back; *M'Kinnell v. Robinson*, 3 M. & W. 434.; or for settling illegal stock-jobbing transactions. *Cannan v. Bryce*, 3 B. & A. 179. So no action lies for the value of goods knowingly sold for illegal purposes—as brewers' drugs; *Langton v. Hughes*, 1 M. & S. 593.; or bricks under statutable size. *Law v. Hodson*, 11 East, 300. See *Gas Light Company v. Turner*, 5 New Ca. 666.; and S. C. 6 Id. 324.

But where the party seeking to enforce the contract has been guilty of contravening a law made, not for the protection of the public, but of the revenue only, it has been held in some cases that this is not such an illegality as will prevent him from recovering at law; as where several partners sued the defendant for the price of spirituous liquors sold, it was held that the omission of the name of one of them in the licence to carry on the business of distillers was no answer. *Brown v. Duncan*, 10 B. & C. 93.; and see *Hodgson v. Temple*, 5 Taunt. 181.; *Johnson v. Hudson*, 11 East, 180.; *Wetherell v. Jones*, 3 B. & Ad. 221.

A foreigner selling and delivering goods abroad to a British subject may recover the price, although he knows at the time of the sale and delivery that the buyer intended to smuggle them into this country, but took no actual part in the illegal adventure, as by packing, &c. *Pellecat v. Angell*, 2 C. M. & R. 311. A brewer, delivering beer to a person not the licensed keeper of the public house where it is delivered, may maintain an action against him for the price. *Brooker v. Wood*, 5 B. & Ad. 1052. A contract to transfer stock at a future day, the seller not having it at the time of the contract, is not contrary to 7 G. 2. c. 8. s. 8., nor illegal at common law. *Mortimer v. M'Callan*, 6 M. & W. 58. And even if it had been illegal, yet the vendor, when the stock had been actually transferred, might have sued for the price; for the transfer was at all events legal. S. C. 9 M. & W. 636.

Illegality. — Sale of spirituous liquors. — Drunkenness.] By statute 24 G. 2. c. 40. s. 12., no person whatsoever shall be entitled unto, or maintain an action, cause or suit for, or recover, either in law or in equity, any sum or sums of money, debt or demand whatsoever, for or on account of any spirituous liquors, unless such debt shall have been really and *bonâ fide* contracted at one time to the amount of twenty shillings or upwards; nor shall any particular article or item in any account or demand for distilled spirituous liquors be allowed or maintained, where the liquors delivered at one time, and mentioned in such article or item, shall not amount to the full value of twenty shillings at the least, and that without fraud or covin, and where no part of the liquors so sold or delivered shall have been returned, or agreed to be returned, directly or indirectly. The statute was once held not to extend to the case of a person who purchases liquors in small quantities to retail them again; as the keeper of an eating-house; *Jackson v. Attrill, Peake*, 180.; but this case has been

overruled by *Hughes v. Done*, 1 Q. B. 294. It applies to the case of a tavern keeper's bill which the defendant has contracted, and in which there are items for spirits supplied to the defendant's guests. *Burnyeat v. Hutchinson*, 5 B. & A. 241. And a bill of exchange, part of the consideration of which is for spirituous liquors sold in less quantities than twenty shillings, is wholly void. *Scott v. Gillmore*, 3 Taunt. 226.; *Gaitskill v. Greathead*, 1 D. & R. 359. But where a bill had been accepted by an officer in payment of small quantities of spirits under twenty shillings, supplied for recruits and others under the defendant's command, Lord Ellenborough was of opinion that the bill was not invalid. *Spencer v. Smith*, 3 Camp. 9.

Drunkenness being a punishable offence, a publican cannot recover for beer furnished by order of the defendant, if the defendant has previously become intoxicated by drinking in his house. *Brandon v. Old*, 3 C. & P. 440.

Illegality.—*Sale on Sunday.*] By 29 C. 2. c. 7. s. 1., no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings, upon the Lord's-day, or any part thereof, works of necessity and charity alone excepted. Upon this statute it has been held that a horse-dealer cannot maintain an action upon a contract for the sale and warranty of a horse made by him upon a Sunday. *Fennell v. Ridler*, 5 B. & C. 408. But where A., not knowing that B. was a horse-dealer, made a verbal bargain with him on a Sunday for the purchase of a horse, and the price, which was above 10*l.*, was then specified, and the horse warranted, but it was not delivered till the following Tuesday, when the money was paid, it was held that there was no complete contract till the delivery of the horse, and consequently that the contract was not void under the statute. *Blossome v. Williams*, 3 B. & C. 232. Though the contract was made by an agent, and the objection is taken by the party at whose request it was entered into on the Sunday, it cannot be enforced. *Smith v. Sparrow*, 4 Bing. 84. But where goods were bought on a Sunday, and the purchaser afterwards, while the goods were in his possession, made a promise to pay for them, it was held that the seller was entitled to recover on a *quantum meruit*. *Williams v. Paul*, 6 Bing. 653. The statute does not make every work or business done on the Lord's-day illegal, but only carrying on trade and ordinary callings on that day. Therefore the hiring of a servant by a farmer on a Sunday is good. *R. v. Whitnash*, 7 B. & C. 596.; see also *Begbie v. Levi*, 1 C. & J. 180.

Immorality.

One who is a party to an immoral contract cannot enforce it. Thus the price of obscene and libellous prints cannot be recovered. *Fores v. Johnes*, 4 Esp. 97. So an action for use and occupation will not lie for premises let for the purpose of prostitution. *Jennings v. Throgmorton*, R. & M. 251. And where an action was brought against the defendant for board and lodging, and it appeared that she was a prostitute, and had boarded and lodged with the plaintiff, who kept a house of ill-fame, and partook of the profits of her prostitution, Lord Kenyon held that such a demand could not be supported. *Howard v.*

Hodges, Selw. N. P. 67. 4th ed. But a person may recover for goods sold to a prostitute, unless he sells her the clothes to enable her to carry on prostitution. *Bowry v. Bennet*, 1 Camp. 348. So where the plaintiff was employed to wash clothes for a prostitute, and knew her to be such, and the clothes consisted principally of expensive dresses, and some mens' night-caps, it was held that she was entitled to recover. *Lloyd v. Johnson*, 1 B. & P. 340.

Insolvency.

Plea of the discharge of the defendant under the insolvent debtors' act. Where a defendant pleads in the usual form that he was discharged under the above act, and the replication denies that such discharge took place, the defendant need not prove the filing of the petition, *Andrew v. Pledger*, M. & M. 508., nor the affidavit of notice. *Pascall v. Brown*, 3 Stark. 54. The only evidence which appears to be necessary under the plea of discharge is the copy of the schedule to shew that the defendant is discharged from the debt in question, and the copy of the adjudication to prove the actual discharge. By the general Insolvent debtor's act 1 & 2 Vict. c. 110. s. 105., a copy of the petition, schedule, order, and other orders and proceedings under the act, purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, schedule, order, or other proceeding, and purporting to be sealed with the seal of the insolvent court, shall, at all times, be admitted in all courts and places whatever, as sufficient evidence of the same, without any proof whatever given of the same. The provisions of this act differ from those of previous acts, which required proof of the seal of the court. When 7 Geo. 4. c. 57. was in force, it was held that proceedings which had taken place under the 1 Geo. 4. c. 119. might be proved in the manner directed by the 7 Geo. 4. c. 57. s. 76. *Doe v. Evans*, 1 C. & M. 450. And see *Doe v. Hardy*, 6 A. & E. 335.; *Doe v. Sellers*, 6 A. & E. 328. The power given by the above acts of offering a certified copy in evidence does not take away the right of the party to give the original order of adjudication in evidence. *Northam v. Latouche*, 4 C. & P. 143. An insolvent who inserts in his schedule the name of the holder of a bill of exchange on which he is liable, or gives such other description of it as satisfies the act, is discharged as to all the parties on the bill (though not named in the schedule), and also, as to the original debt for which it was a security. *Boydell v. Champneys*, 2 M. & W. 433.

Plea of insolvency of the plaintiff. Where the defendant pleads the insolvency of the plaintiff, and the consequent vesting of the right of action in the assignee, the proof depends on the form of the replication. A verbal acknowledgment by the plaintiff of his discharge under the act is not enough. *Scott v. Clare*, 3 Camp. 236. The order for the appointment of an assignee, reciting the date of the vesting order, is not evidence of such date; but this must be proved by a certified copy of the vesting order, or of the adjudication of discharge which shews it. *Yorke v. Brown*, 10 M. & W. 78.

Infancy.

That the defendant was an infant at the time of the contract made, is a good defence, unless the action be for necessaries; and by the new rules this defence must be specially pleaded. Where the action, though in form *ex contractu*, is in fact founded upon the *tort* of the defendant, his infancy will be no defence. Thus an action for money had and received will lie against an infant for money which he has embezzled. *Bristow v. Eastman*, 1 *Esp.* 172.

What are necessaries.] An infant may bind himself for necessaries, that is, for meat, drink, apparel, medicines, and similar necessaries, and also for his good teaching, or instruction. *Co. Litt.* 172 *a. Com. Dig. Infant*, (B. 5.). The question of necessaries is a relative fact, to be governed by the fortune and circumstances of the infant; and the proof of those circumstances lies on the plaintiff. *Per* Lord Kenyon C. J., *Ford v. Fothergill*, 1 *Esp.* 211. They may be necessaries, without being merely requisite for bare subsistence. *Peters v. Fleming*, 6 *M. & W.* 42. It is a question usually left to the jury, subject to the control of the court as to the manner in which the jury have exercised their discretion. *Harrison v. Fane*, 1 *M. & G.* 550. 553. It is a mixed question of law and fact. *Maddox v. Miller*, 1 *M. & S.* 738. An infant, a captain in the army, has been held liable for a livery ordered by him for his servant; but not for cockades for the soldiers of his company. *Hands v. Slaney*, 8 *T. R.* 578.; and see *Coates v. Wilson*, 5 *Esp.* 152. So an infant may bind himself to pay a fine due upon his admission to a copyhold estate; *Evelyn v. Chichester*, 3 *Burr.* 1717; or for necessaries supplied to his wife; *Turner v. Trisby*, 1 *Stra.* 168., *B. N. P.* 155.; or for money advanced in order to liberate him when taken in execution for necessaries. *Clarke v. Leslie*, 5 *Esp.* 28. It is not material to inquire whether the infant was in fact supplied by his friends with an allowance sufficient to buy all necessaries with ready money. *Burghart v. Hall*, 4 *M. & W.* 727. Nor is it a condition precedent to a recovery that the plaintiff should have made inquiry as to the necessity of the articles sold, before he supplied them. *Brayshaw v. Eaton*, 5 *New Ca.* 231.; *Dalton v. Gib*, *Ibid.* 198.

What are not necessaries.] Although an infant may enter into a partnership, he will not be liable for the contracts of the partnership made during his infancy; but he will be liable upon such contracts made after his attaining his full age, unless he notifies his disaffirmance of the partnership. *Goode v. Harrison*, 5 *B. & A.* 147. In one case it was held that a tailor who supplies an infant with clothes cannot recover for more than are necessary in the then actual state of his wardrobe; and that if the infant already had sufficient clothes from other tailors, evidence of that fact was admissible. *Burkhardt v. Angerstein*, 1 *M. & Rob.* 458. But in *Brayshaw v. Eaton*, 5 *New Ca.* 231., the plaintiff recovered, though the defendant had been already supplied by his parents. And see *Burkhardt v. Hall*, cited *supra*. See further on this point, *Bainbridge v. Pickering*, 2 *W. Bl.* 1325., and *Ford v. Fothergill*, *Peake*, 229., in which cases the power of the infant to bind himself by such contracts was considered to depend on the fact of his being properly provided by his parent or

friends. An infant is not liable upon an account stated, even though it appears to be for necessities; nor can the account stated be used as evidence by way of admission on the part of the defendant to shew that necessities have been supplied to that amount. *Ingledeu v. Douglas*, 2 Stark. 36. Nor on a bill of exchange, though given for necessities. *Williamson v. Watts*, 1 Camp. 552. But he will be liable on a bill accepted after twenty-one, though drawn before. *Stevens v. Jackson*, 4 Camp. 164. Where goods are delivered to a carrier for an infant, the infant cannot be charged, though the goods do not reach him till after he is of age; for the property vests on the delivery to the carrier. *Griffin v. Langfield*, 3 Camp. 254. An infant cannot be sued on a warranty of a horse. *Howlett v. Haswell*, 4 Camp. 118. And is not liable for money lent, though it has been laid out in necessities. *Darby v. Boucher*, 1 Salk. 279.; *Probart v. Knouth*, 2 Esp. 472 (n). An infant, a lieutenant in the navy, is not liable for the price of a chronometer; he being out of employment at the time of its being furnished. *Berolles v. Ramsay*, Holt, N. P. C. 77. Dinners, confectionary, and fruit, supplied to an undergraduate out of college are not *prima facie* necessities. *Brooker v. Scott*, 11 M. & W. 67. And the articles supplied cannot be considered as suitable necessities, if they are merely of an ornamental character, as gold rings, &c. *Peters v. Fleming*, 6 M. & W. 42.

Ratification after full age.] If infancy is pleaded, the plaintiff may reply that the defendant ratified and confirmed the contract after he attained the age of twenty-one, and before action brought; *Thornton v. Illingworth*, 2 B. & C. 824.; or, that he promised, &c. after full age. *Cohen v. Armstrong*, 1 M. & S. 724. As to the form of replication, see *Williams v. Moor*, 11 M. & W. 256. A bare acknowledgment, or part payment, after age, will not be sufficient; there must be an express promise; *Thrupp v. Fielder*, 2 Esp. 628.; and such promise must be voluntary; *Harmcr v. Killing*, 5 Esp. 102.; and, since 9 G. 4. c. 14. s. 5., it must be by writing, signed by himself. But no particular form is necessary; the paper need have neither date, nor address; nor need the amount be stated. *Hartley v. Wharton*, 11 A. & E. 934. A contract made by an infant for goods for the purposes of trade, is absolutely void, not voidable only. The law considers it against policy, that he should be allowed to bind himself by such contracts. If he makes a promise after he comes of age, that binds him, on the ground of his taking upon himself a new liability upon a consideration existing before; it does not make it a legal debt from the time of making the bargain; *Thornton v. Illingworth*, 2 B. & C. 826.; the defendant therefore will not be bound beyond the extent of his new promise; as when he promises to pay half-a-crown in the pound on the whole debt, he is not liable beyond that sum. *Green v. Parker*, 1 Esp. Dig. N. P. 198.; *S. C. Peake, Ev.* 297.

Where the defendant pleads infancy, and the plaintiff replies a ratification of the promises, &c. after twenty-one, the plaintiff need only in the first instance prove a promise; and it lies upon the defendant to prove his infancy, as it is a fact peculiarly within his own knowledge; *Borthwick v. Carruthers*, 1 T. R. 648.; accord. *Hartley v. Wharton*, 11 A. & E. 934. But if the plaintiff, to the plea of infancy, replies that the goods were necessities, the defendant need not prove his infancy; but

the plaintiff must in the first instance show that the goods were necessities.

Proof of infancy, when denied.] Infancy may be proved by calling any person who can speak as to the time of the defendant's birth; or by declarations of deceased members of his family mentioning the time of his birth, with proof of identity. See further as to hearsay evidence of birth, *antè*, p. 26, 27. As to proof by parochial or other registers, *antè*, p. 84. 150.

Insanity.

It is not a good defence that the defendant, at the time of the contract entered into, was of unsound mind, unless the plaintiff knew of it and took advantage of that circumstance to impose upon him. *Browne v. Joddrell, M. & M.* 105.; *Levy v. Baker, id.* 106. (n). And it seems that the inquiry as to the necessity of goods supplied, and their suitability to the defendant's condition, may arise on this plea as in that of infancy. See *Baxter v. Earl of Portsmouth*, 5 B. & C. 170.

Limitations, Statute of.

The Statute of Limitations must be pleaded, and could not, even before the new rules of pleading, have been shown under the general issue. 2 *Saund.* 63 b. (n). The statutes applicable to actions of assumpsit are 21 Jac. 1. c. 16., 4 & 5 Ann. c. 16., and 9 Geo. 4. c. 14. (Lord Tenterden's Act). When "the statute" is spoken of generally, that of 21 Jac. 1. is intended.

When the statute begins to run.] In assumpsit the statute begins to run from the time of the breach of promise. Therefore in an action against an attorney, in which it was stated as a breach, that the defendant neglected to make a search at the Bank of England to ascertain whether certain stock was standing in the names of certain persons, it was held that, the omission to search having taken place upwards of six years before, the statute was a bar, though the omission was not discovered till within the six years. *Short v. McCarthy*, 3 B. & A. 628.; *Battley v. Faulkner*, 3 B. & A. 288.; *Colvin v. Buckle*, 8 M. & W. 680. Upon promises to indemnify, the statute runs from the time of damnification. *Huntley v. Sanderson*, 1 C. & M. 467.; *Reynolds v. Doyle*, 1 M. & G. 753. So where a bill of exchange is drawn payable at a future period for the amount of a sum of money lent by the payee to the drawer at the time of drawing the bill, the payee may recover in an action for money lent at any time within six years from the time when the money was to be repaid; i. e. when the bill became due, and not from the time of the loan. *Wittersheim v. Countess of Carlisle*, 1 H. Bl. 631.; *Wheatley v. Williams*, 1 M. & W. 533. Where a bill is not accepted, and the holder gives notice thereof to the drawer, the statute begins to run; and the drawer does not acquire a fresh right of action on the non-payment when due. *Whitehead v. Walker*, 9 M. & W. 506. A note, payable on demand, is payable immediately, and the statute begins to run from the date; *Christie v. Fonsie, Selw. N. P.* 131.; *Norton v. Ellam*, 2 M. & W. 461. But where a note is made payable twenty-four months after demand, the cause of action does not accrue, and therefore the statute does not begin to run, until twenty-

four months after demand made. *Thorpe v. Booth, R. & M.* 388. So where the note is payable after sight, the statute runs only from the time of presentment. *Holmes v. Kerrison, 2 Taunt.* 323.; and see *Savage v. Aldren, 2 Stark.* 232. Where the cause of action does not arise until after request made, the statute will only run from the time of such request. *Gould v. Johnson, 2 Salk.* 422.; *2 Saund.* 63 b. (n). Where the defendant promised to pay a bill of exchange (barred by the statute) when able, the statute runs from the time of being able, though the plaintiff did not know of it, and made no demand. *Waters v. Thanet, 2 Q. B.* 757.

It is no answer to a plea of the Statute that, after the cause of action accrued and the statute had begun to run, the debtor within the six years died, and that an executor of his will was not appointed until after the expiration of the six years, and that the plaintiff sued him within a reasonable time after probate granted. *Rhodes v. Smethurst, 4 M. & W.* 42.

Disabilities.] The infancy, absence beyond seas, or other disability of the plaintiff is provided for by sect. 7. of 21 Jac. 1. c. 16. That of the defendant is provided for by sect. 19. of 4 & 5 Ann. c. 16. In both cases a special replication is necessary.

Ireland, the Isle of Man, and the Channel Islands are not "beyond the seas" within the meaning of 21 Jac. 1. This is expressly enacted by 3 & 4 W. 4. c. 42. s. 7. But Ireland is still a place beyond the seas within 4 Ann. c. 16. s. 19., notwithstanding the act of Union, and the 3 & 4 W. 4. c. 42. s. 7.; and therefore the Statute of Limitations begins to run from a defendant's return, who was in Ireland when the cause of action accrued. *Lane v. Bennett, 1 M. & W.* 70. And when the statute once begins to run, no subsequent disability will prevent its operation. *Cotterell v. Dutton, 4 Taunt.* 826.

Subsequent acknowledgment.] The effect of the Statute of Limitations may be avoided by proof of an acknowledgment of the debt within six years, which acknowledgment is said to be evidence of a new promise to pay the debt, and not merely to draw down the original promise to the time when the acknowledgment is made. *Heyling v. Hastings, 1 Ld. Raym.* 421.; *Hurst v. Parker, 1 B. & A.* 93.; *Pittam v. Foster, 1 B. & C.* 248.; *A'Court v. Cross, 3 Bing.* 332. A verbal promise was formerly held sufficient to revive even a written guarantee. *Gibbons v. McCasland, 1 B. & A.* 690. But the law has been altered by Lord Tenterden's Act.

Acknowledgment. Lord Tenterden's Act.] By statute 9 Geo. 4. c. 14. (reciting the Statute of Limitations, 21 Jac. 1. c. 16., and that various questions have arisen in actions founded on simple contract as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said enactments, &c.) it is enacted,

Section 1. That in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless

such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby ; and that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint-contractor, executor, or administrator shall lose the benefit of the said enactments or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them ; provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of principal or interest made by any person whatever ; provided also, that in actions to be commenced against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial, or otherwise, that the plaintiff, though barred by either of the said recited acts, or this act, as to one or more of such joint contractors, executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment, or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.

Section 2. That if any defendant or defendants in any action on any simple contract shall plead any matter in abatement to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not, by reason of the said acts, or this act, or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same.

Section 3. That no indorsement or memorandum of any payment, written or made after the time appointed for this act to take effect, upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes.

Section 4. That the said recited acts, and this act, shall be deemed and taken to apply to the case of any debt or simple contract alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise.

Before this act promises, or acknowledgments implying promises, took a case out of the statute, and this act has made no other change in the law in this respect than by requiring such acknowledgment or promise to be in writing signed by the party chargeable. No alteration is introduced in the form of the acknowledgment or promise, or with regard to the party to whom it is to be made. See *Haydon v. Williams*, 7 Bing. 163. 166. The former decisions are therefore still to be considered as authorities. No particular form is specified : a paper signed by the defendant, though without date, address, or amount due, will be sufficient. *Hartley v. Wharton*, 11 A. & E. 934. *Contra, Kennett v. Milbank*, 8 Bing. 38. An acknowledgment, to take the case out of the statute, must still be such as will raise an implication of a promise to pay. *Brigstocke v. Smith*, 1 C. & M. 483. The act operates from the 1st of January, 1829, even in cases where the promise was before that day. *Hilliard v. Lenard*, M. & M. 297.

It was ruled at *Nisi Prius* that an oral statement of an account within six years and a promise to pay the balance, would, in effect, take the original debt out of the statute by giving a new cause of action on the account stated. *Smith v. Forty*, 4 C. & P. 126. And this is law where there are items of account on both sides. *Ashby v. James*, 11 M. & W. 542. See Alderson B. in *Hopkins v. Logan*, 5 M. & W. 248. But a mere parol statement of an antecedent debt, without any new contract or consideration, made within six years does not constitute a sufficient cause of action to prevent the operation of the Statute. *Jones v. Ryder*, 4 M. & W. 32. It is doubtful whether the drawing of a bill in favour of the plaintiff is evidence of the acknowledgment of a debt, due on account of the original demand for which the bill is given, in an action on that demand. *Gowan v. Forster*, 3 B. & Ad. 512.

Where the debtor stated in writing that arrangements had been making to enable him to discharge the account, that funds had been appointed, of which B. was trustee, to whom he had handed the account, and that B. had authorised him to refer the creditor to him; this was held not sufficient to take the case out of the statute; the debtor not charging himself by the acknowledgment. *Whippy v. Hilary*, 3 B. & Ad. 399. So if the debtor merely refers the creditor to certain funds in the hands of others, and tells him "to pay himself" out of them, this is no promise charging himself. *Roulledge v. Ramsay*, 8 A. & E. 221.

Acknowledgment — Payment, effect of.] Part payment of the debt is an acknowledgment of its existence, and has always been held to take a case out of the statute; and as Lord Tenterden's act leaves the effect of payment as before, the cases relating to part payment are still to be considered authority. It must appear that the payment was on account of the debt for which the action was brought, and that it was made as part payment of a greater debt. *Typets v. Heane*, 1 C. M. & R. 252. Payment of interest on a note due more than six years ago, will take the note out of the statute. *Bealy v. Greenslade*, 2 C. & J. 61.; *Purdon v. Purdon*, 10 M. & W. 562. The delivery of a bill in payment operates from the delivery, and not from the payment of the bill. *Irving v. Veitch*, 3 M. & W. 90. Where a payment of part of the demand is made as and for a payment of the whole that is considered by the defendant to be due, such payment will not take the rest out of the statute. *Semb. Waugh v. Cope*, 6 M. & W. 824. A payment made to the creditor to the use of his debtor by a third party cannot be appropriated by the creditor so as to bar the statute. *Waller v. Lacy*, 1 M. & G. 54. In assumpsit on a promissory note bearing interest, proof that defendant, being sent to by plaintiff for money, paid 1*l.* and said "this puts us straight for last year's interest all but 18*s.*; some day next week I will bring that up," is sufficient to take the case out of the Statute of Limitations, no evidence being given of any other debt due from defendant to plaintiff. *Evans v. Davies*, 4 A. & E. 840. Where the defendant authorised an agent to offer the plaintiff a part of his debt in discharge of the whole, and, on the plaintiff's refusal so to accept it, the agent exceeded his authority and paid the sum offered in part discharge, it was held that this was not a part payment to take the debt out of the statute. *Linsell v. Bonsor*, 2 New Ca. 241.

An acknowledgment by payment cannot be proved by the oral admission of the defendant. *Willis v. Newham*, 3 Y. & J. 518. But if

the fact of the payment be proved by independent evidence, the appropriation of such payment to the particular debt may be proved by the declaration of the debtor. *Waters v. Tompkins*, 2 C. M. & R. 723. Not only must the admission of payment be in writing, but the writing must be signed by the party charged. *Bayley v. Ashton*, 12 A. & E. 493.; *Eastwood v. Saville*, 9 M. & W. 615. A payment in goods taken as money is within the 9th Geo. 4. c. 14., so as to prevent the operation of the Statute of Limitations. *Hart v. Nash*, 2 C. M. & R. 337.; *Hooper v. Stephens*, 4 A. & E. 71.

Part payment of principal or interest by one of several makers of a joint and several promissory note has been held to be such an acknowledgment as to take the case out of the statute, as against all the makers; *Whitcomb v. Whiting*, 2 Doug. 652.; *Wyatt v. Hodson*, 8 Bing. 309.; *Pease v. Hurst*, 10 B. & C. 122.; *Dowling v. Ford*, 11 M. & W. 329.; *Channell v. Ditchburn*, 5 M. & W. 494.; though the others have signed as sureties only; *Perham v. Raynal*, 2 Bing. 306. But it is not sufficient merely to show a payment by a joint maker of a note to the payee within six years, without showing that it was made on account of the note. *Holme v. Green*, 1 Stark. 488. In an action against A., on a note made by him and B. (the signature of the latter being attested by a witness), the plaintiff cannot take the case out of the statute by showing payments by B. without calling the attesting witness. *Wilde v. Porter*, 3 Nev. & M. 585. Where A. and B. made a joint and several promissory note, and A died, and ten years after his death B. paid interest upon the note, it was held that such payment did not take the case out of the statute, so as to make A.'s executors liable; for B. and the executors did not remain jointly liable, nor were they liable in the same capacity. *Atkins v. Tredgold*, 2 B. & C. 23. So after the death of one maker of a joint and several promissory note signed by two, a payment upon it by the executor of the deceased party will not take the debt out of the Statute of Limitations as against the survivor. *Slater v. Lawson*, 1 B. & Ad. 396.

Where A., B., and C., overseers, borrowed money for the parish, and gave promissory notes, signed by them as overseers, for the amount, payment of interest by the vestry (the accounts being signed by A.) was held to take the case out of the statute. *Rew v. Pettet*, 1 A. & E. 196. Payment to an administrator (on a note) who has neglected to take out administration in the diocese in which the note is *bonum notabile*, is sufficient. *Clark v. Hooper*, 10 Bing. 480. The trustees of certain legatees lent part of the trust money upon a promissory note, describing them as such trustees, to the defendant. A payment of the principal and interest to one of the legatees within six years was held to take the case out of the statute. *Meggison v. Harper*, 2 C. & M. 322., S. C. 4 Tyr. 94.

Acknowledgment — by whom.] Since 9 G. 4. c. 14., the acknowledgment must be signed by the party chargeable. Signature by an agent in the name of the principal and with his assent, was held insufficient in *Hyde v. Johnson*, 2 New Ca. 776.

Even before that act, Lord Tenterden held that, as against an executor, an *acknowledgment* merely is not sufficient to take the case out of the statute, but there must be an express promise; and if there are several executors, a promise by all; *Tullock v. Dunn*, R. & M. 416.; and

where an action was brought against A., and B. and C. his wife, upon a joint promissory note made by A. and C. before her marriage, and the promise was laid by A. and C. before her marriage, and the Statute of Limitations was pleaded, upon which issue was joined, it was held that an acknowledgment of the note by A. within six years, but after the intermarriage of B. and C., was not evidence to support the issue. *Pittam v. Foster*, 1 B. & C. 248.

The late act has expressly provided that, in future, a promise by one of several debtors shall not deprive the rest of the benefit of the Statute of Limitations, *ante*, p. 315.

As to the necessity of a stamp on instruments given in evidence as acknowledgments, see *ante*, p. 159. and 171.

Acknowledgment — to whom.] An acknowledgment, being evidence of a new promise, must be to a person who is in existence to receive it : therefore, in an action by an executrix, a statement by the defendant to her, that "the testator always promised never to distress him for it," was held to be no evidence of a promise to pay made to the testator within six years. *Ward v. Hunter*, 6 Taunt. 210. An acknowledgment by the acceptor of a bill that he was indebted on it to the payee, but that he was not indebted to the drawer, there being no consideration for the bill, is not sufficient to take the case out of the statute, in an action by the drawer. *Easterly v. Pullen*, 3 Stark. 186. An acknowledgment made to a stranger that the debt is owing to the plaintiff, is sufficient. *Peters v. Brown*, 4 Esp. 48. So an acknowledgment within six years, in a deed between the defendants and third persons, of the existence of a debt due to the plaintiffs, who are strangers to the deed. *Mountstephen v. Brooke*, 3 B. & A. 141. And see *Clark v. Hougham*, 2 B. & C. 149. ; *Halliday v. Ward*, 3 Camp. 32. An acknowledgment made to an executor or administrator will not support a count laying the promise to the testator, or intestate. *Sarell v. Wine*, 3 East, 409. 2 Saund. 63. g (n).

Acknowledgment — what sufficient.] In many cases a very slight acknowledgment has been held sufficient. Thus where, in answer to an application for money due from the defendant and C., the defendant wrote, "I received your letter, and beg leave to refer you to my trustee Mr. W. H. on this complicated business. I should be glad to be informed how you have settled it with C.," Lord Kenyon held the acknowledgment sufficient. *Bailie v. Lord Inchiquin*, 1 Esp. 435. "What an extravagant bill you have delivered me!" was held an acknowledgment of some money being due. *Lawrence v. Worrall, Peake*, 93. In an action on a promissory note the following acknowledgment was held sufficient, the defendant not showing that there were other matters besides the promissory note to which the acknowledgment could refer: "Business calls me to L. Should I be fortunate in my adventures you may depend on seeing me in less than three weeks, otherwise I must arrange matters with you as circumstances will permit." *Frost v. Bengough*, 1 Bing. 266. See also *Colledge v. Horn*, 3 Bing. 119. So, "I will not pay; there are none paid; and I do not mean to pay unless obliged; you may go and try." *Dowthwaite v. Tibbut*, 5 M. & S. 75. This case, however, was decided at a time when the statute was considered only as a presumptive bar. An acknowledgment, coupled with a statement that the debtor "never will

pay," is not now held to be sufficient, as not implying a promise to pay. See Lord Tenterden C. J. in *Tanner v. Smart*, 6 B. & C. 610. And it is questionable whether some of the above cases can now be relied upon as law. See *Poynder v. Bluck*, 5 Dowl. P. C. 570. A promise in writing to pay "the balance due," is sufficient without any further expression of the amount; but without some other evidence to show what the balance is, the plaintiff is only entitled to nominal damages. *Dickinson v. Hatfield*, 1 M. & Rob. 141. And, generally, an absolute admission of some debt being due, coupled with evidence to prove the amount, is sufficient. *Cheslyn v. Dalby*, 4 Y. & C. 238.; *Waller v. Lacy*, 1 M. & G. 54.

The following passages, in letters from the defendant in answer to one of the plaintiff's not produced, have been held to be sufficient, and not conditional. "I can never be happy until I have not only paid you every thing, but all to whom I owe money. It is impossible to state to you what will be done in my affairs at present. It is difficult to know what will be best, but immediately it is settled you shall be informed." "Your account is quite correct, and oh! that I were going to enclose the amount of it." "If she (another creditor) will only have patience, I will in time pay every farthing, as also Miss D." (the plaintiff). The court held, however, that the plaintiff was only entitled to nominal damages, no evidence having been given of the amount of the debt. *Dodson v. Mackey*, 4 Nev. & M. 327. A promise to pay a proportion of a joint debt is sufficient, though no amount is specified; the plaintiff may prove the amount by other evidence. *Lechmere v. Fletcher*, 1 C. & M. 623., S. C. 3 Tyr. 450. *Bird v. Gammon*, 3 New Ca. 883. An entry in a bankrupt's examination of a certain sum being due to A. is sufficient to take the case out of the statute. *Eicke v. Nokes*, 1 M. & R. 359. The following acknowledgment was held to be sufficient: "I beg to say, I cannot comply with your request. The best way for you will be to send another bill, and draw another for the balance of your money, 30l.;" and it was held not to be necessary to give evidence of another bill having been drawn. *Dubbs v. Humphries*, 10 Bing. 406. The following letter was held sufficient to take the case out of the statute, "I wish I could comply with your request, for I am very wretched on account of your not being paid; there is a prospect of an abundant harvest which must turn into a goodly sum and considerably reduce your account; if it does not the concern must be broken up to meet it. My hope is that out of the present harvest you will be paid;" and it was also held that the amount might be proved by extrinsic evidence. *Bird v. Gammon*, 3 New Ca. 883.

An acknowledgment since action brought has been held sufficient. *Yea v. Fouraker*, 2 Burr. 1099. But as the implied promise is supposed to be the one mentioned in the declaration, it is doubtful whether such an admission would now be held sufficient.

Acknowledgment — what not sufficient.] Where, in answer to a letter from the plaintiff's attorney, the defendant wrote, "Sir, as soon as I am able to attend to my concerns, I shall wait on Captain C. (the plaintiff), whom I shall be able to satisfy respecting the misunderstanding which has occurred between us," Gibbs C. J. thought it not sufficient to take the case out of the statute. *Craig v. Cor, Holt*, N. P. C., 380. So where, in answer to a demand for charges relative to the grant of an

annuity, the defendant said, "He thought it had been settled at the time the annuity was granted; that he had been in so much trouble since, that he could not recollect any thing about it." *Hellings v. Shaw*, 1 B. Moore, 340., S. C. 7 Taunt. 611. So where the defendant, having denied the existence of the debt, said, on being requested to look at documents in proof of it, "It is no use for me to look at them, for I have no money to pay it now," *Snook v. Mears*, 5 Price, 636. So where the defendant referred the plaintiff to his attorney, "who was in possession of his determination and ability." *Bicknell v. Keppel*, 1 N. R. 20. Where the acknowledgment was, "I cannot afford to pay my new debts, much less my old ones," and the jury negatived the acknowledgment, the court refused a new trial. *Knott v. Farren*, 4 D. & R. 179. So, "I will see my attorney, and tell him to do what is right." *Miller v. Caldwell*, 3 D. & R. 267. Where the defendant, on being arrested, said, "I know that I owe the money, but the bill I gave was on a three-penny receipt stamp, and I will never pay it;" the acknowledgment was held insufficient. *A Court v. Cross*, 3 Bing. 329. The following letter from the defendant to plaintiff's attorney was held not sufficient. "Since the receipt of your letter (and indeed for some time previously) I have been in almost daily expectation of being enabled to give a satisfactory reply to your application respecting the demand of Messrs. M. against me. I propose being in Oxford to-morrow, when I will call upon you on the matter." *Morrell v. Frith*, 3 M. & W. 402. "Send me your bill, and, if just, I will not give you the trouble of going to law," is not sufficient, as it contains no admission of any debt. *Spong v. Wright*, 9 M. & W. 629. The writing must import an unqualified acknowledgment of a debt, from which a promise may be inferred by the court. *Fearn v. Lewis*, 6 Bing. 349.

Where the expressions of the defendant are ambiguous, it was held to be a question of fact for the jury whether they amounted to an acknowledgment of the debt. *Lloyd v. Maud*, 2 T. R. 760.; and see *Linsell v. Bonsor*, 2 New Ca. 241. But this has been questioned in later cases, and it has been since held that the construction of a doubtful document, given in evidence to defeat the Statute of Limitations, is for the court and not for the jury, though, if extrinsic facts are adduced in explanation, these facts are for the consideration of the jury. *Morrell v. Frith*, 3 M. & W. 402.; *Routledge v. Ramsay*, 8 A. & E. 221.

Acknowledgment—accompanied with denial of liability.] Where the defendant acknowledges the debt, but insists at the same time that the statute bars it, such acknowledgment has been held in several cases to take the case out of the statute; *Bryan v. Horseman*, 4 East, 599.; *Rucker v. Hannay*, id. 604 (n); *Leaper v. Tatton*, 16 East, 420.; but these and other cases to the same effect are at variance with the principle laid down in *Tanner v. Smart*, 6 B. & C. 603. &c., which requires that the acknowledgment should be one which implies an unqualified promise to pay.

Where the defendant acknowledges the debt, but insists that it is paid or discharged, the whole of his admission must be taken together, and the case will not be taken out of the statute. Thus, where the defendant said, "I have paid the debt and will send you a copy of the receipt," but such a copy was never sent, Lord Ellenborough held the acknowledgment insufficient. *Birk v. Guy*, 4 Esp. 184, *Anon.* cited *Holt*, N. P. C. 381. Where the acknowledgment was, "You owe me

more money; I have a set-off against it," it was held (Best J., *dis.*) not to take the case out of the statute. *Swann v. Sowell*, 2 B. & A. 759. So, where on application for the amount of a bill the defendant said, "that there had been such a bill, but that the plaintiff and his deceased partner had received the money, and that there was a balance due to him (the defendant) from the executors of the deceased," the acknowledgment was held not to be sufficient, and it was doubted whether the plaintiff could go into evidence of the account between the deceased partner and the defendant, to falsify what the latter said. *Beale v. Nind*, 4 B. & A. 568. Where the acknowledgment was, "I acknowledge the receipt of the money, but the testatrix gave it me," it was held not sufficient to take the case out of the statute. *Owen v. Wolley*, B. N. P. 148.

Where the defendant, in his acknowledgment, rests his discharge upon a written instrument to which he refers with precision, evidence of that instrument has been admitted to show that it does not operate as a legal discharge. *Partington v. Butcher*, 6 Esp. 66. *Hellings v. Shaw*, 1 B. Moore, 344. S. C. 7 Taunt. 608. But the doctrine is adverted by the court with some expression of doubt in *Beale v. Nind*, *supra*.

Acknowledgment — conditional.] When the promise relied upon is conditional, the plaintiff must show the condition performed; thus, where the defendant promised to pay the debt when he was able, Lord Kenyon ruled that the plaintiff was bound to show that the defendant was then of sufficient ability to pay, adding, that it had been so ruled before by Eyre C. J. *Davies v. Smith*, 4 Esp. 36. And see *Beaford v. Saunders*, 2 H. Bl. 116. Upon the following acknowledgment, "I shall be happy to pay you both principal and interest when convenient; I shall pay no more interest till we have a fair settlement," it was held that the plaintiff was bound to show that it was convenient to pay, and also, as it seems, that a settlement had taken place. *Edmunds v. Downs*, 4 Tyr. 73. So where the promise was, "I cannot pay the debt at present, but I will pay it as soon as I can," the court of King's Bench held that it was necessary for the plaintiff to show the defendant's ability to pay. *Tanner v. Smart*, 6 B. & C. 603. And see *Ayton v. Boll*, 4 Bing. 105.; *A Court v. Cross*, 3 Bing. 329.; *Haydon v. Williams*, 7 Bing. 163. The only doubt is, whether the plaintiff is bound to declare specially on such qualified promise, or can show, under the common replication to the plea of Statute of Limitations, that the promise is become absolute by the performance of the condition? In practice such evidence is often received on the common traverse. *Leaper v. Tatton*, 16 East, 420.; *Irving v. Veitch*, 3 M. & W. 107. 111.; *Morris v. Dixon*, 4 A. & E. 845. But a special declaration is also not uncommon.

Whether the promise be qualified or not is a question of construction for the court and not for the jury, except where extrinsic evidence affects the construction. *Routledge v. Ramsay*, 8 A. & E. 221. See *anté*, p. 320.

Mutual accounts.] Accounts concerning the trade of merchandise between merchant and merchant are excepted from the operation of the statute. But this exception extends only to actions of account, or, perhaps, to actions on the case for not accounting; *Inglis v. Haigh*,

8 M. & W. 769.; or, at all events, only to cases where an action of account would lie. *Cottam v. Partridge*, 4 M. & G. 271.

Before the stat. 9 G. 4. c. 14., it was held that where there have been mutual current and unsettled accounts between the parties, and any of the items are within six years, such items are evidence, (under the replication that the defendant did promise, &c.) as an admission of there being an open account, so as to take the case out of the statute, like any other acknowledgment. *Catling v. Skoulding*, 6 T. R. 189., 2 Saund. 227 a. (n). But since that statute there must be part payment, or something equivalent to it, or a distinct acknowledgment, to have this effect. *Williams v. Griffiths*, 2 C. M. & R. 45.; *Mills v. Fowkes*, 5 New Ca. 455.; *Cottam v. Partridge*, 4 M. & G. 271.

Payment.

By the new rules of H. T. 4 W. 4. it is directed that payment should be specially pleaded; but even without a special plea evidence of payment had since the new rules been allowed in assumpsit in reduction of damages. *Shirley v. Jacobs*, 2 New Ca. 88. In debt such evidence was held to be inadmissible without a plea of payment. *Belbin v. Butt*, 2 M. & W. 422.; *Cooper v. Morecraft*, 3 M. & W. 500.

There had also existed, since the new rules, a difference of opinion as to the necessity of pleading a payment which had been admitted by the plaintiff in his particulars of demand. See *Coates v. Stevens*, 2 C. M. & R. 119.; *Ernest v. Brown*, 3 New Ca. 674.; *Nicholl v. Williams*, 2 M. & W. 758.; *Kenyon v. Wakes*, 2 M. & W. 764.

These questions are now set at rest by the additional new rules of T. T. 1 Vict., which direct that payment shall not, in any case, be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar; and that in any case in which the plaintiff, in order to avoid the expense of the plea of payment, shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, it shall not be necessary for the defendant to plead payment. But the rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums.

Since this rule, payment cannot be given in evidence without a plea, though only for the purpose of showing that interest is not due on the debt demanded, the debt itself being admitted by payment into court. *Adams v. Palk*, 3 Q. B. 2. Where the plaintiff gave the defendant credit in his particular for a bill indorsed to the plaintiff, and debited him with the amount as dishonoured, the defendant was not permitted to show, under non assumpsit, that the plaintiff had made the bill his own by laches; for the particular, in effect, gives no credit at all, and the constructive payment must therefore be pleaded. *Green v. Smithies*, 1 Q. B. 796. The plaintiff's particular set forth a bill amounting to 116*l.*, and professed to go for "a balance of 27*l.* after credit for payments on account and sets-off:" held, that this did not amount to giving credit for the exact difference, but that defendant was bound to plead payments. *Morris v. Jones*, *Id.* 397.

In one case payment was admitted in evidence on the general issue, though not noticed in the plaintiff's particular; namely, where the defendant proved that the goods were sold for ready money and paid for

on delivery ; for the plaintiff was bound to prove a sale *on credit* ; and where ready money is paid, no debt arises. *Bussey v. Barnett*, 9 M. & W. 312.

Where the plaintiff's particular admits a payment, he can recover only the amount by which his claims, as proved, exceed the payment. *Rowland v. Blaksley*, 1 Q. B. 403. The particular claimed a balance of 29*l.* for goods sold, and gave credit for 920*l.* paid. The plaintiff proved a claim of 949*l.* for goods sold : it appeared that 84*l.* worth of the goods had been taken back. Held, that the plaintiff might turn the balance in his favour by showing that he had given credit for 84*l.* as part of the payment. *Lamb v. Micklethwait*, *Id.* 400.

In an action for 30*l.* for work and labour, to which the defendant pleaded the general issue, and payment of all the monies in the declaration, on which issue was taken, the defendant proved payment of 90*l.* : Held, that the plaintiff might show work done to an amount exceeding 90*l.*, and recover the balance ; for the plea must be proved by showing payment of all that the plaintiff can prove, and no new assignment is necessary ; *Freeman v. Crafts*, 4 M. & W. 4. ; and this decision has been recognised and confirmed by the Common Pleas in *James v. Lingham*, 5 New Ca. 553., and by the Queen's Bench in *Alston v. Mills*, 9 A. & E. 248. Declaration for work and labour, with a particular for contract work and extra work : plea *nunquam indebitatus*, and a plea of payment confined to contract work : the replication traversed the payment : Held, that the plaintiff could not recover for extras without a new assignment. *Rogers v. Custance*, 1 Q. B. 77.

A plea of payment is so far divisible, that if, to a declaration on special assumpsit, defendant pleads payment of a certain sum in satisfaction generally, and proves payment of a less sum, he is entitled to a verdict unless the plaintiff proves damages to a larger amount. *Falcon v. Benn*, 2 Q. B. 314. So if the defendant pleads "as to —*l.* parcel," &c., payment of that amount, and proves payment of a less sum, he is entitled to a verdict *pro tanto*, though the damages exceed that amount, provided the excess be covered by other pleas also found for the defendant. *Cousins v. Paddon*, 2 C. M. & R. 547. But where the plaintiff proves a larger debt than the payment covers, the issue must be found for the plaintiff, and the payment will only go in reduction of damages. *Tuck v. Tuck*, 5 M. & W. 109. ; *Kilner v. Bailey*, *Id.* 382. And it seems that there is no distinction in this respect between assumpsit and debt in the general *indebitatus* form. See *per cur.* in *Cousins v. Paddon*, and *Tuck v. Tuck*, *ubi supra*. Also *antè*, p. 50.

To and by whom, and how.] Payment to an authorised agent is sufficient. *Goodland v. Blewith*, 1 Camp. 477. ; *Coates v. Lewes*, *id.* 444. ; *Owen v. Barrow*, 1 N. R. 101. Thus payment to an attorney, while an action is subsisting, is good ; *Anon.* 1 Dowl. P. C. 173. ; but not to his clerk, who shows no other authority than his master's order to receive it. *Per* Lord Kenyon C. J., *Coore v. Callaway*, 1 Esp. 115. So payment to the attorney's agent is not good. *Yates v. Freckleton*, 2 Doug. 623. But payment to a person found in a merchant's counting-house, and appearing to be intrusted with the conduct of the business there, is a good payment to the merchant, though the person was, in fact, never employed by him. *Barrett v. Deere*, M. & M. 200. ; and see *Wilmott v. Smith*, *id.* 238. In a late case, *Littledale J.* expressed an

opinion that an agent employed to sell has no authority, as such, to receive payment. *Mynn v. Josse*, 1 M. & Rob. 326. And an auctioneer, though he is authorised to receive the deposit, has no general authority to receive the purchase-money. *Sykes v. Giles*, 5 M. & W. 645.

Where a creditor directs his debtor to transmit money by the post, and it is lost, the creditor must bear the loss; *Warwicke v. Neokes, Peake*, 67.; and where no directions are given about the mode of remittance, yet, this being done in the usual way of transacting business, it seems that the debtor is discharged. *Per* Lord Kenyon C. J., *ibid.* It has been ruled that if the letter is delivered to the bellman in the street, and is lost, it is no payment. *Hawkins v. Rutt, Peake*, 186. But this decision appears to be at variance with *Pack v. Alexander*, 3 Moore & S. 789.

A payment to one of several persons (not partners) without the authority of the others, who have deposited money in a bank, is not good as against the others. *Innes v. Stephenson*, 1 M. & Rob. 145.; *Stewart v. Lee*, M. & M. 158. But a payment to one partner is payment to all, and a receipt by one is *prima facie* evidence against all; but they may show that it was given fraudulently to defeat the action. *Farrar v. Hutchinson*, 9 A. & E. 641.

Payment by an attorney to a creditor will support an averment of payment by the principal, though the latter has not repaid his attorney, but has only given him a promissory note. *Adams v. Dansey*, 6 Bing. 506. In assumpsit for money lent, payment was pleaded; the plaintiff new assigned, and the defendant pleaded non assumpsit to the new assignment: The plaintiff at the trial claimed 15*l.* for money lent in August, 1833, and proved an acknowledgment by the defendant after that time that he owed the plaintiff 15*l.*: The defendant gave evidence of his having paid the plaintiff 15*l.* in October, 1833. The Court held that the proper question for the jury was, whether or not there had been two debts; and that the defendant was not precluded from taking this point by the evidence of payment which he had produced at the trial. *Hall v. Middleton*, 4 A. & E. 107.

Application of payments.] In general, the party who pays money has a right to direct the application of it; but where money is paid to a creditor generally without any specific appropriation by the party paying, and the creditor has several demands against the party paying, he may apply the money paid to which of those demands he pleases. *Hall v. Wood*, 14 East, 243. (n).; *Clayton's case*, 1 Merivale, 572. The creditor need not apply it to any particular demand at the moment of payment, but has a right to make the application at a subsequent period; nor will an entry in his books, applying it to a particular demand, but not communicated to the party paying, preclude him from applying it afterwards to another demand. *Simson v. Ingham*, 2 B. & C. 65. See also *Grigg v. Cocks*, 4 Simons, 438. The creditor may apply the payment to the discharge of a prior and purely equitable demand, and sue his debtor at law for the subsequent legal debt. *Bosanquet v. Wray*, 6 Taunt. 597.; but see *Birch v. Tebbutt*, 2 Stark. 74. He may apply it to a debt barred by the Statute of Limitations; though such payment will not take the whole debt out of the statute. *Miller v. Fowkes*, 5 New Ca. 455. So where the party paying is indebted to the party receiving for a sum due from his wife *dum sola*, and also on an-

other demand, the party receiving may apply the money to the first demand. *Goddard v. Cox*, 2 *Stra.* 1194.

In some instances the law will direct the application of money paid generally. Thus, where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and new firm in one entire account, the payments, made from time to time by the surviving partners, must be applied to the old debt. *Per Bayley J., Simson v. Ingham*, 2 *B. & C.* 72.; *Clayton's case*, 1 *Merivale*, 572.; *Brooke v. Enderby*, 2 *B. & B.* 71. So payments by a debtor to surviving partners, from time to time, upon one general account including an old debt due to the former firm, are to be applied, in the first place, to such old debt. *Bodenham v. Purchas*, 2 *B. & A.* 39. But where the old debt is not brought into the new account, general payments on the new account are not to be considered as made in discharge of the old debt. *Simson v. Ingham*, 2 *B. & C.* 65. And where there are distinct demands, one against persons in partnership, and another against one only of the partners, if the money paid be the money of the partners, the creditor is not at liberty to apply it to the debt of the individual. *Thompson v. Brown, M. & M.* 40. Where payments are made upon one entire account, they are to be considered as payments in discharge of the earlier items. *Per Bayley J., Bodenham v. Purchas*, 2 *B. & A.* 46. So a general payment must be applied to a prior legal, and not to a subsequent equitable demand. *Goddard v. Hodges*, 1 *C. & M.* 33. Where security had been given by a surety for goods to be supplied to his principal, and not in respect of a previously existing debt, and payments were made from time to time by the principal, in respect of some of which discount had been allowed for prompt payment (the goods having been sold on credit), it was held that it was to be inferred in favour of the surety, that the payments were in liquidation of the latter account; *Marryatt v. White*, 2 *Stark.* 101.; but the law will not, in favour of a surety, direct the application of money paid generally in discharge of the debt secured, without some circumstances to show that it was so intended. *Plomer v. Long*, 1 *Stark.* 153.; *Williams v. Rawlinson*, 3 *Bing.* 71.

When A. has a demand against B. as executor, and also another demand against him in his own right, and B. makes a general payment, A. cannot apply it to the former demand; *Goddard v. Cox*, 2 *Stra.* 1194.; and where there are two demands, one legal, and the other illegal, and a general payment is made, the law will apply it to the discharge of the legal demand. *Wright v. Laing*, 3 *B. & C.* 165. But where one of the demands is for spirituous liquors supplied in quantities not amounting to 20s. at a time, the party receiving the money may apply it to that demand; the statute 24 G. 2. c. 40. only preventing the seller from maintaining an action. *Cruickshanks v. Rose*, 1 *M. & Rob.* 100. And in such a case the creditor may apply the payment to the demand for spirituous liquors, although his particulars claim the whole demand; and he may make the appropriation at any time before the matter comes before the jury. *Philpott v. Jones*, 2 *A. & E.* 41.

As to cases in which payment will be presumed, see *antè*, p. 20—22., and as to the effect of written receipts, see *antè*, p. 39.

Payment by a bill or note.] If the seller of goods takes notes or bills for them without agreeing to run the risk of the notes being paid, and

they turn out to be worth nothing, this will not be considered as payment. *Owenson v. Morse*, 7 T. R. 64; *Swingard v. Bowes*, 5 M. & S. 62. But if the seller agree to run the risk of the bill being bad, and to take it as payment or cash, he cannot, on the dishonour of the bill, resort to his original cause of action. *Ward v. Evans*, 2 Salk. 442. By an agreement entered into between the plaintiff, together with other creditors, and the defendant, the defendant agreed to pay a composition of 15s. in the pound by two instalments, and a surety, in consideration of the creditors agreeing to discharge the defendant from all debts on receiving such composition, agreed to pay a sum of money in part payment of the first instalment, and to accept a bill of exchange drawn by the defendant in part payment of the second, the creditors agreeing to "exonerate and discharge the defendant on payment of the said 15s. in the pound." It was also agreed, that several bills of exchange, the amount of which was equal to the residue of the sum payable on the composition, which had been before indorsed by the defendant, and handed over to the plaintiffs, should be considered as part payment of the said 15s. in the pound. It was held, that the bills left in the hands of the plaintiffs were not, under this agreement, to be considered as an absolute payment, unless they were paid when at maturity, and, one of them having been dishonoured, that the defendant remained liable upon his indorsement. *Constable v. Andrew*, 2 C. & M. 298. Where a purchaser gives the seller an order upon a third person entitling him to receive cash, instead of which the vendor elects to take a bill, in such case, though the bill is dishonoured, the purchaser is discharged. *Vernon v. Boverie*, 2 Show. 296; *Smith v. Ferrand*, 7 B. & C. 19. But it is otherwise if the order is upon the purchaser's agent, and the seller takes from him a check which is dishonoured. *Everett v. Collins*, 2 Camp. 515. Where the master of a vessel took from the freighter's agent abroad, who was furnished with funds to pay him the freight, a bill upon a third person, which was dishonoured, it was held by Gibbs C. J., that the freighter was not thereby discharged. *Marsh v. Pedder*, 4 Camp. 257. Payment is not proved by the sending of a check to the plaintiff, which purported to be the balance of an account; for acceptance of such a check might operate as an admission of the balance; and the payee of such a check need not present it, or, *semb.*, return it: but it would be otherwise if the plaintiff had accepted it as cash. *Hough v. May*, 4 A. & E. 954.

Payment by bills is *prima facie* evidence of payment, without showing that such bills were paid; it is for the plaintiff to show that they have been dishonoured. *Hebden v. Hartsink*, 4 Esp. 46.; *Stedman v. Gooch*, 1 Esp. 4. Where the purchaser gave the seller an order on his banker for a "good bill on London," to the amount of the goods, and the seller took a bill which was afterwards dishonoured, Lord Kenyon held that it was incumbent on the seller to take care that he got a good bill, and that he could not on its being dishonoured have recourse to his demand for goods sold. *Holton v. Reichard*, 1 Esp. 106. But this case is probably misreported; see *Taylor v. Briggs*, M. & M. 28., and note, *ibid.* Where goods were sold without recourse to the buyer in case of non-payment, to be paid for by E.'s bill on P., and the vendee knew the bill to be worth nothing, it was held that the vendor could not sue in assumpsit for the price of the goods, but that his remedy was an action of tort. *Read v. Hutchinson*, 3 Camp. 352. Where a bill, indorsed in blank, is taken by the vendor for goods, and lost before it is

paid, the vendor can neither recover for the price of the goods nor upon the bill. *Champion v. Terry*, 3 B. & B. 295. But where the purchaser of goods accepted a bill drawn in favour of the seller, who lost it before he indorsed it, it was held that this was no defence in an action for the value of the goods. *Rolt v. Watson*, 4 Bing. 273.

Payment of Money into Court.

The cases decided upon the effect of this plea have been referred to in the first part, p. 45—47.

Release.

A release must, by the new rules, be specially pleaded. After breach, the contract can only be discharged by a release under seal; but before breach it may be discharged by parol, *ante*, p. 16.

Though a release of the whole debt, given to one of two joint contractors, enures to the benefit of both, yet receiving a portion of a debt and putting an end to an action against one of the contractors, is not a release of the other. *Walters v. Smith*, 2 B. & Ad. 889. So a release under seal to one may reserve the right of proceeding against the other. *Solly v. Forbes*, 2 B. & B. 38. But where the right is not reserved in the release itself, parol evidence of the reservation cannot be given. *Cocks v. Nash*, 9 Bing. 341. A covenant not to sue will support a plea of release; but a covenant by one of several joint creditors not to sue the defendant is not pleadable as a release to an action by all. *Walmsley v. Cooper*, 11 A. & E. 216.

A discharge of one joint and several debtor is a discharge of all. *Nicholson v. Revill*, 4 A. & E. 675.

The plaintiff lent the defendants and others, co-adventurers in a mine, a sum of money on the security of a note for the amount by the defendants alone. He afterwards signed a composition deed with the adventurers, which provided that, if he should sue any of them for their debt due to the plaintiff it should operate as a release of the debt. Held, that the debt due from the defendants to the plaintiff on the note was not released by suing on it, such note not being a debt due from the whole body of adventurers. *Lanyon v. Davey*, 11 M. & W. 218.

Set-off.

A set-off must, by the new rules, be specially pleaded. *Graham v. Partridge*, 1 M. & W. 395.

The plea of set-off is not divisible. If, therefore, it be pleaded to the whole demand, and it is not proved to be at least equal to the amount which the plaintiff proves to be due, the plaintiff will have a verdict, though the amount actually proved will go in reduction of damages. *Moore v. Butlin*, 7 A. & E. 595. But if the plea is pleaded with other pleas, and the defendant under his other pleas reduces the demand down to the amount covered by the set-off, then the defendant is entitled to a verdict on this plea. *S. C.*, and *Tuck v. Tuck*, 5 M. & W. 109. See *ante*, p. 50. and p. 323.

The common replication to a plea of set-off will enable the plaintiff to prove any defence to it that would have been admissible before the late rules of pleading; for those rules do not apply to replications. *Jackson v. Robinson*, 8 Dowl. P. C. 622. But where the plaintiff replied *numquam indebtedatus*, the plaintiff was held not entitled to prove pay-

ment ; for on that issue the defendant was only put to prove that a debt once existed. *Brown v. Daubeny*, 4 Dowd. P. C. 585.

Where the defendant has been obliged to finish work which the plaintiff had contracted to do, and for which he seeks to recover in *indebitatus*, the amount laid out by the defendant cannot be pleaded as a set-off, but is matter of deduction on the general issue. *Turner v. Diaper*, 2 M. & G. 241.

When the plea does not cover the whole demand, but goes only in reduction of damages, the plaintiff, when he takes a verdict for the balance, should apply to have a special indorsement on the *postea* in order to protect him from an action for the amount allowed under the set-off. *Jervis's New Rules*, p. 405. n. (a.), 4th ed.

It is only necessary to plead a set-off where there are cross demands ; for where the nature of the employment or dealings necessarily constitutes an account consisting of receipts and payments, debts, and credits, the balance only is the debt. See *Green v. Farmer*, 4 Burr. 2221., and *Le Loir v. Bristow*, 4 Camp. 134.

The defendant pleaded by way of set-off a bond given to him by the plaintiff, conditioned for payment of an annuity to a third person which had been previously granted by the defendant, and that a certain sum was in arrear ; it was held that the defendant was not bound to prove that he had paid the money, in order to set it off, but that on production of the bond the plaintiff was bound to prove payment. *Penny v. Foy*, 8 B. & C. 11.

Where the defendant pleads a set-off the plaintiff is not obliged to prove the whole of his account in the first instance, but may prove only the balance, and, on the defendant's establishing his set-off, may prove other parts of his account to cover it. *Williams v. Davies*, 1 C. & M. 464.

The allowance of a set-off on the plaintiff's particular will not dispense with a plea of set-off, but will be evidence of it when pleaded. If, however, the defendant uses the particular for this purpose, the whole account, as stated by the plaintiff in it, must be submitted to the jury. *Rowland v. Blaksley*, 1 Q. B. 403.

Where the particular of set-off claimed on an "acceptance" of the plaintiff, and it was in fact an indorsement by him, the variance was held immaterial, the amount and date being sufficient to prevent the plaintiff from being misled. *Parsons v. Wilson*, 3 M. & G. 445.

Nature of the debt set off, and of the debts against which it is set off.] In cases where either of the debts shall accrue by reason of a penalty in any bond or specialty, the plea must show how much is justly due on either side ; 8 G. 2. c. 24. s. 4. The demand intended to be set off must be liquidated. *Freeman v. Hyett*, 1 W. Bl. 394. Thus a guarantee, though of a sum certain, cannot be set off. *Crawford v. Stirling*, 4 Esp. 207. ; *Morley v. Inglis*, 4 New Ca. 58. So in an action by a servant against his master for wages, the latter cannot set off the value of goods lost by the negligence of the former ; but if it should be proved to be part of the original contract, that the servant should pay, out of his wages, the value of his master's goods lost through his negligence, this would be tantamount to an agreement that the wages should be paid only after deducting the value of the things so lost, which, in an action of *indebitatus assumpsit*, would be a good defence under the

general issue. *Le Loir v. Bristow*, 4 Camp. 134. A stipulated sum, to be paid on the non-performance of certain work as stipulated liquidated damages, may be a subject of set-off. *Fletcher v. Dyche*, 2 T. R. 32.

A judgment may be pleaded by way of set-off, though a writ of error be pending thereon; *Reynolds v. Beerling*, cited 3 T. R. 188.; see *Curling v. Innes*, 2 H. Bl. 372.; and where in an action on a promissory note for 30*l.* the plaintiff took a verdict for the whole sum, and the defendant had at the same sittings an action against the plaintiff for 11*l.*, to which there was a notice to set off the note of hand, the court held that notwithstanding the verdict the note might be set off. *Baskerville v. Brown*, B. N. P. 180., S. C. 2 Burr. 1229.; *Evans v. Prosser*, 3 T. R. 186. A debt cannot be set off till the time at which it is actually due. *Rogerson v. Ladbroke*, 1 Bing. 99. A debt barred by the Statute of Limitations cannot be set off; and if pleaded, the plaintiff may reply the statute; B. N. P. 180.; and it must be replied, if relied on.

With regard to the nature of the demand against which the set-off is claimed, it is held that it must be for liquidated damages. Therefore, in assumpsit for not indemnifying the plaintiff against certain accommodation acceptances, whereby he was forced and obliged to pay to the holders of the bills certain sums of money, with interest, charges, and expenses, it was held that a set-off could not be pleaded; *Hardcastle v. Netherwood*, 5 B. & A. 93.; but the defendant might, perhaps, have pleaded a set-off to that part of the count which charged him with the amount of the acceptances paid by the plaintiff. *Per cur. ibid.* *Auber v. Lewis*, *Manning's Index*, 251. And where the plaintiff declared specially in assumpsit for not accounting, with a count for money had and received, and non-assumpsit was pleaded to the whole declaration, and a set-off to the general count, and the plaintiff proved a balance due to him, which might have been recovered under either count, Gibbs C. J. held that the defendant might avail himself of his set-off. *Birch v. Depeyster*, 4 Camp. 387.

In order to constitute a valid set-off the demands must be mutual, and due in the same right.

Bankrupts.] The cases on mutual credit and set-off between a bankrupt and other persons will be found, *post*, tit. *Actions by Assignees of Bankrupts*.

Executors.] By 2 G. 2. c. 22. s. 13., where either party sues or is sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set off against the other. But in an action by an executor in his own name, to recover money due to the testator in his lifetime, and received by the defendant after his death, the defendant cannot set off a debt due to him from the testator. *Shipman v. Thompson*, *Willes*, 103. So though the plaintiff declares *as executor*, if the cause of action arose after the death of the testator. *Kilvington v. Stevenson*, *Selw. N. P.* 145.

Factors and agents.] An agent employed to recover a sum of money is entitled to retain a just allowance for his labour and service therein, and, as such allowance is not in the nature of a cross demand or mutual debt, he may give it in evidence under the general issue, in an action for money had and received; *Dale v. Sollet*, 4 Burr. 2133.; and when the

plaintiff sues in *indebitatus assumpsit* for an alleged balance in the agent's hands, this still appears to be law, notwithstanding the new rules.

Where a factor sells goods without disclosing the name of his principal, the purchaser, in an action by the principal for the price, may set off a debt due to himself from the factor. *Rabone v. Williams*, 7 T. R. 380. (n). *George v. Clagett*, 7 T. R. 359.; *Carr v. Hinchiff*, 4 B. & C. 547. Yet if, before they are all delivered and before any part of them is paid for, the purchaser is informed that they belong to a third person, in an action by the latter the purchaser cannot set off a debt due to him by the factor. *Moore v. Clementson*, 2 Camp. 22. See *Warner v. McKay*, 1 M. & W. 591. A broker (whose character differs materially from that of a factor), in selling goods without disclosing the name of his principal, acts beyond the scope of his authority, and the buyer therefore cannot set off a debt due from the broker to him in an action for the goods by the principal. *Baring v. Corrie*, 2 B. & A. 137.; see stat. 6 G. 4. c. 94.

Tender.

A plea of tender operates (like a plea of payment of money into court) as an admission of the special contract stated in the count to which it is pleaded. *Cox v. Brain*, 3 Taunt. 95. Thus, in an action on a guarantee it supersedes the necessity of proving it to be in writing. *Middleton v. Brewer, Peake*, 15.; see *antè*, p. 45. 47.

By whom a tender must be made.] The tender need not be made by the debtor himself; it is sufficient if made by his agent; and a tender by an agent, at his own risk, of more than the money given him by his principal, is good. *Read v. Goldring*, 2 M. & S. 86.

To whom a tender must be made.] A tender to a person authorised by the creditor to receive money for him is sufficient. *Goodland v. Blewith*, 1 Camp. 477.; *Kirton v. Braithwaite*, 1 M. & W. 310. And where a clerk, who was in the habit of receiving money for his master, was directed by his master not to receive the sum in question, for that he had put it into the hands of his attorney, and the clerk, on tender made, refused to receive the money assigning the reason, it was held to be a good tender to the principal. *Moffat v. Parsons*, 5 Taunt. 307. But a tender made to the managing clerk of the plaintiff's attorney, who at the time disclaimed authority from his master to receive the debt, was held insufficient. *Bingham v. Allport*, 1 Nev. & M. 398. A tender of the debt sued for to the attorney on the record is a good tender to the principal. *Crozer v. Pilling*, 4 B. & C. 26. And a tender to a person in the office of the plaintiff's attorney, who is referred to on the subject by a clerk in the office, and who refuses the tender only as being of an insufficient sum, is a good tender, without shewing who that person was. *Wilmott v. Smith*, M. & M. 238. So a tender to a person in the plaintiff's (a merchant) place of business, who appeared to be conducting it, is good, though not, in fact, entrusted to receive money. *Barrett v. Deere*, *ibid.* 200. But it is otherwise where the payment is not connected with the plaintiff's business, but quite collateral to it. *Sanderson v. Bell*, 2 C. & M. 304. Where the money was brought to the house of the plaintiff, and delivered to his servant,

who retired, and appeared to go to his master, it was held to be evidence for the jury, from which they might infer that a tender was made. *Anon.* 1 *Esp.* 349. A tender to one of several partners is sufficient. *Douglas v. Patrick*, 3 *T. R.* 683.

Tender, to what amount.] If a man tenders more than he ought to pay, it is good; for the other ought to accept so much as is due to him. *Wade's case*, 5 *Rep.* 115. c.; *Aslley v. Reynolds*, 2 *Str.* 916. But it seems that such a tender is only good where it is made in monies numbered, so that the creditor may take what is due to him. Therefore a tender of a 5*l.* note, requiring change, is not good. *Betterbee v. Davis*, 3 *Camp.* 70.; *Robinson v. Cook*, 6 *Taunt.* 336.; *Watkins v. Robb*, 2 *Esp.* 711.; *Brady v. Jones*, 2 *D. & R.* 305. But proof of a tender of 20*l.* 9*s.* 6*d.* in bank notes and silver, will support a plea of tender of 20*l.* *Dean v. James*, 4 *B. & Ad.* 546. And where a greater sum is tendered than the sum pleaded, and the creditor refuses to receive it, on the ground that the amount is not sufficient, and not on account of the form of the tender, the tender is good. *Black v. Smith, Peake*, 88.; *Saunders v. Graham, Gow*, 121. So where defendant laid down a gross sum in coin, and desired the plaintiff to tell him what was due, and to take principal and interest out of it, this was held good. *Bevens v. Rees*, 5 *M. & W.* 306. Where a party has several demands for unequal sums against several persons, a tender of one sum for the debts of all, is not a good tender of any one of the debts. *Strong v. Harvey*, 3 *Bing.* 304. A tender to one of several partners, including a debt due to the partnership, and also a debt due to that one partner individually, is a good tender of the partnership debt, unless objected to on account of the form of the tender. *Douglas v. Patrick*, 3 *T. R.* 683.; and see *Black v. Smith, Peake*, 88.

Tender, in what kind of money.] By stat. 56 Geo. 3. c. 68. s. 11. the gold coin of the realm was declared to be the only legal tender for payments (except as thereafter provided) within the United Kingdom of Great Britain and Ireland. And by sect. 12. no tender of payment of money made in the silver coin of the realm of any sum exceeding the sum of 40*s.* at one time shall be a legal tender.

A tender of a country bank note is good, where the creditor objects only to the *quantum* and not to the quality of the tender. *Polglass v. Oliver*, 2 *C. & J.* 15.; *Lockyer v. Jones, Peake*, 180. (n). So a tender of a banker's check, in the like circumstances. *Welby v. Warren, Tidd*, 183.; *Jones v. Arthur*, 8 *Dowl. P. C.* 442.

With respect to tendering money in bank notes, the stat. 3 & 4 W. 4. c. 98. s. 6. has provided, that from and after the 1st day of August, 1834, until parliament shall otherwise direct, a tender of a note or notes of the Bank of England, expressed to be payable to bearer on demand, shall be a legal tender to the amount expressed in such note or notes, and shall be taken to be valid as a tender to such amount for all sums above 5*l.*, on all occasions on which a tender of money may be legally made, so long as the Bank of England shall continue to pay on demand their said notes in legal coin: provided that no such note shall be deemed a legal tender of payment by the Governor and Company of the Bank of England, or any branch bank of the said Governor and Company; but the said Governor and Company are not to

be required to pay, at any branch bank of the said Governor and Company, any notes of the said Governor and Company not made specially payable at such branch bank; but the Governor and Company shall be liable to pay, at the Bank of England in London, all notes of the said Governor and Company, or of any branch thereof.

Tender, whether the money must be actually produced.] The actual production of the money due, in monies numbered, is necessary, unless the creditor dispenses with the production of it at the time, or does any thing which is equivalent to that. *Per* Lord Ellenborough, *Thomas v. Evans*, 10 *East*, 101. Thus, where the defendant left 10*l.* with his clerk for the plaintiff, of which the clerk informed the plaintiff when he called and demanded a larger sum, and the plaintiff said he would not receive the 10*l.*, nor any thing less than his whole demand, but the clerk did not offer the 10*l.*, this was held to be no tender. *Ibid.* And see *Dickinson v. Shee*, 4 *Esp.* 68. But where the defendant went to the plaintiff and told him that he had eight guineas and a half in his pocket, which he had brought for the purpose of satisfying his demand, but the plaintiff told him "he need not give himself the trouble of offering it, for that he would not take it," the tender was held to be good. *Douglas v. Patrick*, 3 *T. R.* 684.; and see *Ryder v. Townsend*, 7 *D. & R.* 119. The agent of the defendant met the plaintiff in the street and told him that he was come to settle the business between the defendant and him, and that he was desired by the defendant to offer him 4*l.*: the plaintiff said he would not take it; the witness then said he would give him the other 10*s.* out of his own pocket, and run the risk of being repaid. He then pulled out his pocket-book, and told the plaintiff that if he would go into a neighbouring public-house he would pay him, but the plaintiff said he would not take it; this was held to be a good tender of 4*l.* 10*s.* *Read v. Goldring*, 2 *M. & S.* 86. Where a witness stated that the defendant was willing to give the plaintiff 10*l.*, and that she (the witness) offered to go up stairs, where the money was, and fetch that sum, but that the plaintiff said "she need not trouble herself, for he could not take it;" this was held by Best C. J. to be a good tender. *Harding v. Davies*, 2 *C. & P.* 77.; see also *Kraus v. Arnold*, 7 *B. Moore*, 59.; and *Glasscott v. Day*, 5 *Esp.* 49. On a plea of tender of 1*l.* 12*s.* 6*d.*, the jury found specially that the defendant's attorney called on the plaintiff, and said, "I come to pay you 1*l.* 12*s.* 6*d.* which the defendant owes you;" that the attorney put his hand in his pocket, but did not produce the money, the plaintiff saying "I can't take it; the matter is now in the hands of my attorney." It was held that, upon this finding, the defendant was not entitled to judgment. *Finch v. Brook*, 1 *New Ca.* 253., *S. C.* 1 *Scott*, 70. But the court seem to have been of opinion that a dispensation from the production might have been implied from the above facts, and found by the jury.

Tender must be unconditional.] In order to support a plea of tender, there must be evidence of an unqualified offer. Therefore where the defendant tendered a sum of money, and at the same time delivered a counter claim upon the plaintiff, and the plaintiff did not take up the money or paper, but simply said, "You must go to my attorney," the tender was held insufficient. *Brady v. Jones*, 2 *D. & R.* 305. But

quere of this case, unless the retainer of the counterclaim was meant to be a condition? A tender accompanied with a protest against the party's liability, was held to be insufficient in *Simmons v. Wilmott*, 3 Esp. 94. But *Thorpe v. Burgess*, 9 Dougl. P. C. 603, is *contra*. So an offer of payment, clogged with a condition that it should be accepted as the balance due, does not amount to a legal tender. *Evans v. Judkins*, 4 Camp. 156.; and see *Hurham v. Smith*, 2 Camp. 21.; *Strong v. Harvey*, 3 Bing. 304.; *Hough v. May*, 4 A. & E. 954. But a tender accompanied by a statement by the defendant that "he has come to pay the amount of his (the plaintiff's) bill," is sufficient, though the plaintiff insisted that "it was not his bill," and refused it on that account; for such statement is no more than is implied in every tender, viz. that the debtor intends it to cover the whole demand, and asserts that it does so. *Henwood v. Oliver*, 1 Q. B. 409. Where the plaintiff offered to take the sum tendered, in part of his demand, but the defendant would only allow him to take it "as a settlement," it was held not a good tender. *Mitchell v. King*, 6 C. & P. 237. So where a tender is accompanied with a demand of a receipt in full of all demands. *Glasscott v. Day*, 5 Esp. 48.; *Higham v. Baddely*, Gow, 213.; *Ryder v. Townsend*, 7 D. & R. 119. But, though a party tendering money cannot, in general, demand a receipt for the money, where the creditor did not object to the demand of a receipt, but only that the sum was insufficient, the tender was held good. *Richardson v. Jackson*, 8 M. & W. 298. Where the defendant tendered the money, saying, "If you will give me a stamped receipt, I will pay you the money," and the plaintiff refused to take it, Abbott C. J. held this to be no proof of a tender; *Laing v. Meader*, 1 C. & P. 257.; and *per curiam*, *ibid*, the debtor ought to bring a receipt with him, and require the creditor to sign it, and if the latter refuses, he is liable to a penalty, by 43 Geo. 3. c. 126. s. 4, 5. It is, however, not clearly settled that a tender, requiring a receipt, is not a good one. See *Richardson v. Jackson*, *supra*.

Whether a tender be conditional or not is generally a question for the jury. *Eckstein v. Reynolds*, 7 A. & E. 80.

Tender, evidence on replication.] The plaintiff may reply a prior or subsequent demand or refusal; and such demand must be proved to be of the precise sum tendered. *Rivers v. Griffiths*, 5 B. & A. 630. The demand must be by a person authorised to receive the money, and therefore a demand by the clerk of the plaintiff's attorney (who does not bring his master's receipt) is insufficient. *Coore v. Callaway*, 1 Esp. 115. A subsequent demand upon one of two joint debtors is sufficient. *Peirce v. Bowles*, 1 Stark. 323. A letter written by the plaintiff's attorney, and received by the defendant, demanding the sum tendered, is not, as it seems, sufficient evidence of a subsequent demand; for at the time of the demand, the defendant should have an opportunity of paying the sum demanded. *Edwards v. Yates*, R. & M. 360.; but see *Hayward v. Hague*, 4 Esp. 93. *contra*.

CASE FOR NUISANCE.

Under this head are inserted those cases which apply to nuisances in general, as affecting real property, and also some instances of particular injuries which cannot be conveniently introduced under subsequent heads.

The new rules H. 4 W. 4. provide that the plea of Not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed, and not of the facts stated in the inducement. All other pleas in denial shall take issue on some particular fact, and all matters in confession and avoidance shall be pleaded specially as in actions of assumpsit. See *Appendix*, No. I.

The plaintiff may, by proper pleas, be put to prove the inducement, if any; his title; the nuisance; and the damages.

Proof of plaintiff's title.] It is sufficient for the plaintiff to prove, as alleged in the declaration, that he was possessed of the premises injured by the nuisance. The right to incorporeal hereditaments, was frequently proved by presumptive evidence of enjoyment for upwards of twenty years; and now by stat. 2 & 3 W. 4. c. 71. the right becomes indefeasible after certain periods. See this act stated, *post*, p. 337. 340. 342. If the nuisance be of a permanent nature, and injurious to the reversion, an action may be brought by the reversioner as well as by the tenant in possession; each being entitled to recover his respective loss. *Beddingfield v. Onslow*, 3 Lev. 209., 1 Saund. 322 b. (n). The reversioner may sue where the injury complained of is an injury to his right, though the nuisance is capable of being easily removed. *Shadwell v. Hutchinson*, M. & M. 350. If any thing is done to destroy the evidence of title, an action is maintainable by the landlord against his tenant. Thus, if the tenant opens a new door, the landlord may recover against him in this action pending the lease, though the house itself may not be injured by it, provided the jury find that his reversionary interest was injured; for the alteration of the property may tend to the injury of the owner, even when not thereby deteriorated. *Young v. Spencer*, 10 B. & C. 152. So the erection of a roof, which throws rain-water into the yard of the plaintiff's tenant, is a ground of action to the plaintiff, if the jury think the reversion is damaged. *Tucker v. Newman*, 11 A. & E. 40. But no action lies against a stranger for a mere trespass, though it be a claim of right, as claiming a way &c.; such an act not being injurious to the reversion. *Baxter v. Taylor*, 4 B. & Ad. 72.

In an action for an injury to the reversion in cutting down a tree, the tenant holding under a written agreement, the court of K. B. held that it was necessary to produce the agreement. *Cotterill v. Hobby*, 4 B. & C. 465. But the court of C. P. were divided on this point. *Strother v. Barr*, 5 Bing. 136. See further, *antè*, p. 1, 2.

In an action by the reversioner, a trustee, proof that the *cestuique trust* let the premises and received rent from the tenant was held sufficient to support a count stating that the premises were in the occupa-

tion of the tenant, as tenant to the plaintiff. *Vallance v. Savage*, 7 Bing. 595.

Where the defendants, corporators, had erected a building on the land of the corporation which obstructed the market of L., and L. afterwards demised the market to the plaintiff, case was held to lie for the plaintiff against the defendants for continuing the nuisance. *Thompson v. Gibson*, 7 M. & W. 456.

Proof of the nuisance.] In case for a nuisance to the plaintiff's house by an offensive trade, Not guilty puts in issue the carrying on of the alleged trade so as to be a nuisance to the plaintiff's occupation of the house; and not his occupation. R. H. 4 W. 4.

To erect any thing offensive so near the house of another as to make it useless; as a swine-sty, a forge, &c., is actionable; *Com. Dig. Action on the Case for Nuisance (A)*; and it is enough that it renders the enjoyment of life and property uncomfortable. *Per* Lord Mansfield in *R. v. White*, 1 Burr. 337. Where, indeed, the plaintiff brought his action against the defendant for keeping his dogs so near the plaintiff's house that his family were prevented from sleeping during the night, and were much disturbed during the day, and the jury found a verdict for the defendant though no evidence was given by him, the court refused to grant a new trial. *Street v. Tugwell*, Selw. N. P. 1047. But the court would, no doubt, have upheld a verdict the other way, if the jury had found it to be a nuisance; for noise may be a nuisance even in a legal trade. See *Elliotson v. Feetham*, 2 New Ca. 134. But for such things as merely abridge the gratification of the plaintiff in the enjoyment of his property, as shutting out the prospect from his windows, an action will not lie. *Aldred's case*, 9 Rep. 58. b. Nor can an action be maintained for the reasonable use of a person's rights in a convenient place, though it be to the annoyance of another; as if a butcher, brewer, &c., use his trade in a convenient place. *Com. Dig. Action on the Case for Nuisance (C)*.

An action does not lie against a man for pulling down his house, whereby the plaintiff's adjoining house falls for want of shoring; for the plaintiff ought to shew a right to the support of the defendant's house. *Peyton v. Mayor of London*, 9 B. & C. 725. So the possessor of a house, which is not ancient, cannot maintain an action against the owner of the adjoining land for merely digging away that land, so that the house falls in; no negligence appearing. *Wyatt v. Harrison*, 3 B. & Ad. 871. But though the owner of the house injured neglects to shore it up, yet, if the defendant pulls down his house in a negligent and improvident manner, so as to occasion greater risk to the owner of the adjoining house than in the ordinary course of doing the work he would have incurred, the defendant is liable. *Walters v. Pfeil*, M. & M. 365.; *Brown v. Windsor*, 1 C. & J. 20.; *Dodd v. Holme*, 1 A. & E. 493.; *Trower v. Chadwick*, 3 New Ca. 334. But the mere circumstance of juxta-position does not make notice of the defendant's intention to pull down necessary. *Chadwick v. Trower*, 6 New Ca. 1., S. C. in error. If a party builds a house on his own land which has previously been excavated to its extremity for mining purposes, he does not acquire a right to support from the adjoining land of another, at least not until twenty years have elapsed since the house first stood on excavated land, and was in part supported by the adjoining land, so that a grant

by the owner of the adjoining land of such right to support may be inferred; and it seems that such grant ought not to be inferred until after the lapse of twenty years since the owner of the adjoining land knew, or had the means of knowing, that the land had been so excavated. Therefore the owner of the adjoining land is not liable to an action on the case, if, within such period, he works mines under his own land so near its boundary as to cause the excavated land, on which the house stands, to sink, and the house to be thereby injured. *Partridge v. Scott*, 3 M. & W. 220.

An action lies for so negligently constructing a hay rick in the extremity of defendant's land, that in consequence of its spontaneous ignition plaintiff's house was burnt; and it was held that it was properly left to the jury whether defendant had been guilty of gross negligence, viewing his conduct with reference to the caution that a prudent man would have observed. *Vaughan v. Menlove*, 3 New Ca. 468. The plaintiff, who had demised a cottage reserving mines, was held entitled to sue for an injury to the cottage by a stranger who had dug the mineral, though it was not clear on the evidence whether the injury arose from excavations under the cottage, or under another house of the plaintiff. *Raine v. Alderson*, 4 New Ca. 702.

The nuisance, occasioned by the defendant.] This action may be brought either against the person who originally occasioned the nuisance, or against his alienee, who permits it to be continued; but a request to the alienee to remove or abate the nuisance must be proved. *Penrudock's case*, 5 Rep. 101. a. Where a notice to remove the nuisance had been served upon the predecessor of the defendant, Abbott C. J. ruled that, being delivered on the premises to the occupier for the time being, it bound a subsequent occupier. *Salmon v. Bensley*, R. & M. 189. Where a landlord employed workmen to repair a house in the possession of his tenant, and directed the repairs, the landlord was held answerable for a nuisance occasioned by the negligence of his workmen. *Leslie v. Pounds*, 4 Taunt. 649. If the defendant has let the premises with the nuisance on them, or if he lets premises the natural consequence of the regular use of which is that they will become a nuisance, he is liable; and his assignee is also liable, although the premises were under lease when assigned, so that the assignee could not enter to remove the nuisance; and the landlord is liable for a nuisance erected by his tenant, if he afterwards renews the tenancy, or, *semb.* if he refrains from exercising a right to enforce the removal. *R. v. Pedly*, 1 A. & E. 822. A clerk who superintends the erection of the building which occasions the nuisance, and who alone directs the workmen, is liable to be joined as a co-defendant with the original contractor. *Wilson v. Peto*, 6 B. Moore, 47. An action on the case for not repairing fences can only be maintained against the occupier, and not against the owner of the fee not in possession; *Cheetham v. Hampson*, 4 T. R. 318.; unless he is bound to repair. *Payne v. Rogers*, 2 H. Bl. 349. See *Boyle v. Tamlyn*, 6 B. & C. 329. Where persons in the exercise of a public duty, as commissioners of sewers or trustees of roads, do some act within their jurisdiction, which is a nuisance to the property of another, yet no action lies. *Plate Glass Co. v. Meredith*, 4 T. R. 794.; *Boulton v. Crowther*, 2 B. & C. 703. But if they act in an arbitrary and oppressive manner they are answerable; *Leader v. Moxton*, 3 Wils. 461.; *Boulton v. Crowther*, *ubi supra*, 707.; and so if

they exceed the authority entrusted to them; *Boulton v. Crowther*, 2 B. & C. 709, 710.; *Plate Glass Co. v. Meredith*, 4 T. R. 798.; or act carelessly or negligently; *Jones v. Bird*, 5 B. & A. 837.; *Boulton v. Crowther*, *ubi supra*, 711.; *Grocers' Co. v. Donne*, 3 New Ca. 34. A lodger in a house has a right to the use of the knocker, doorbell, staircase, &c., and if the landlord obstructs him in the enjoyment or deprives him of the use of these, an action on the case lies against him. *Underwood v. Burrows*, 7 C. & P. 26.

Competency of witness.] The tenant of the land is, at common law, a competent witness for the reversioner in an action by the latter for a nuisance. *Adeane v. Mortlock*, 5 New Ca. 236.

Defence.

The effect of the general issue in actions on the case since the new rules has already been pointed out.

In actions on the case, in which the *gist* of the action is the consequential damage, the time of limitation begins to run from the occurring of the consequential damage. *Roberts v. Read*, 16 East, 215.; *Gillon v. Boddington*, R. & M. 161.; *Howell v. Young*, 5 B. & C. 268. Where a statute directed an action to be brought within six months after the *matter or act done*, and the injury was sinking a sewer whereby the walls of the plaintiff's house cracked, it was held that the action must be brought within six months from the time of the walls cracking. *Lloyd v. Wigney*, 6 Bing. 489.; *Wordsworth v. Harley*, 1 B. & Ad. 391.

It is no defence that the nuisance was carried on for ten years (or for any number of years less than twenty) before the plaintiff was possessed of his house. *Elliotson v. Feetham*, 2 New Ca. 134.; and see *Bliss v. Hall*, 4 New Ca. 183. Nor is it any defence that the noises, complained of by the plaintiff, were not greater than was necessary and unavoidable in the defendant's business. *Elliotson v. Feetham*, *supra*.

CASE FOR OBSTRUCTION OF LIGHT AND AIR.

The declaration usually states the possession of a house, in which are certain windows through which light and air ought of right to enter; the obstruction of the light by the defendant; and the consequent injury to the house. The action may be brought by a reversioner, in which case the declaration will involve further statements. *Shadwell v. Hutchinson*, M. & M. 350.

The right to the light and air.] The right to unobstructed light and air (which is not put in issue by the plea of Not guilty, but must be specially traversed) arises either by prescription, or covenant express or implied.

By stat. 2 & 3 Will. 4. c. 71., for shortening the time of prescription, it is enacted, s. 3., that when the access or use of light to or for any dwelling-house, workshop, or other building, shall have been actually

enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local custom to the contrary notwithstanding, unless it shall appear that it was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

By sect. 4. the period shall be taken to be the period next before some suit wherein the claim or matter shall have been or shall be brought into question; and no act shall be deemed to be an interruption unless it shall be submitted to or acquiesced in for one year after the party interrupted shall have had notice thereof, and of the person making or authorising it to be made.

By sect. 6. no prescription shall be allowed in favour of any claim upon proof of the exercise or enjoyment of the right or matter claimed, for any less period or number of years than the period or number mentioned in the act as applicable to the case.

By sect. 5., if the right, alleged generally in an action on the case, is denied, all matters in the act mentioned and provided, which shall be applicable, to the case, shall be admissible in evidence to sustain or rebut such allegation.

The use of an open area, as a timber-yard or sawpit, for twenty years, will not entitle the owner to the unobstructed enjoyment of light and air under the above act. *Roberts v. Macord*, 1 M. & Rob. 230.

Before this act, the right could not generally be established by mere user where the premises against which the right is sought to be established, i. e. the servient tenement, were under lease, or in possession for the tenant of a particular estate. *Daniel v. North*, 11 East, 372. But the right may be acquired indefeasibly in such case under sect. 3. Hence the easements or servitudes *altius non tollendi* and *ne luminibus officiat* may now be acquired over the land, as it seems, without the consent of the landlord, if the tenant chooses to submit to them.

Where the windows are alleged to be "ancient," proof of enjoyment for twenty years will satisfy the allegation. *Trotter v. Harris*, 2 Y. & J. 285, 288. An enjoyment for nineteen years and thirty days, followed by an interruption of thirty-five days just before the commencement of the suit, is sufficient to establish the right. *Flight v. Thomas*, 11 A. & E. 688. And it is observable that the words "claiming right thereto," used in sects. 1 and 2., are omitted in sect. 3. *Ibid*, 695.

The right may be gained by an implied contract not to derogate from a grant. Thus, if A. sells or leases a house to B., he cannot afterwards build on his (A.'s) own land, so as to obstruct a window existing in the house at the time of the conveyance. *Palmer v. Fletcher*, 1 Lev. 122. Nor can any one claiming under A. obstruct it. *Coutts v. Gorham*, M. & M. 396.; *Swanborough v. Coventry*, 9 Bing. 309. But if A. first sells the land to C., and then the house to B., it is questionable whether B. has a right of unobstructed enjoyment as against C.; see *Palmer v. Fletcher*, *ubi supra*. Where the owner of a house let part of it to a tenant, it was held that the tenant could not erect an addition to the front of his house so as to obscure the shop window of his landlord existing at the time of the lease. *Riviere v. Bower*, R. & M. 24. In *Compton v. Richards*, 1 Price, 27., where a row of unfinished buildings was put up for sale by auction in lots, and a plan of the buildings was produced at the sale, which each purchaser was

bound to conform to in completing them, it was held that the purchaser of one could not afterwards make an addition to his house so as to obstruct the windows of an adjoining house; and this without reference to priority of completion.

The Building Act, 14 Geo. 3. c. 78., will not enable a party to build a party-wall so as to darken ancient lights. *Wells v. Ody*, 1 M. & W. 452.

Right to the light and air, how lost.] An ancient window, bricked up for twenty years, loses its privilege. *Lawrence v. Obce*, 3 Camp. 514. And the privilege may be released by disuse for even a less time. Thus, where the plaintiff pulled down a wall with an ancient window in it, and rebuilt a blank wall, and seventeen years afterwards reopened a window in the old place, it was held that the window had lost its privilege, there being no apparent intention of resuming the old right when the wall was rebuilt. *Moore v. Rawson*, 3 B. & C. 332. In this case the defendant had, in the mean time, erected a building which would have been an obstruction of the old light; but it does not appear that any such act was necessary in order to prevent a resumption of the old right; see *Gale and Whatley on Easements*, p. 361. If a wall with ancient windows is rebuilt in advance of its former site, and windows are placed looking in the same direction as before in the new wall, the new windows are not privileged. *Blanchard v. Bridges*, 4 A. & E. 176. But if an old window is merely enlarged, no part of the space occupied by the old one can be obstructed. *Chandler v. Thompson*, 3 Camp. 80. A window, however, may be so altered as to be prejudicial to the owner of the servient land; in which case the right will be wholly lost. *Garritt v. Sharp*, 3 A. & E. 325.

Proof of obstruction.] It is sufficient to prove that the plaintiff cannot enjoy his lights in so free and ample a manner as he ought. *Cotterell v. Griffiths*, 4 Esp. 69. And where the plaintiff had only a qualified right, viz. to a window with a blind attached to it to prevent his neighbour from being overlooked, if he removes the blind, yet his neighbour cannot build so as to exclude more light from the plaintiff than before. *S. C. ibid.* The diminution of light must be such as to render the premises sensibly less fit for occupation. *Parker v. Smith*, 5 C. & P. 438.; *Wells v. Ody*, 7 C. & P. 410.; and *ibid.* 337.

CASE FOR DISTURBANCE OF COMMON.

In an action on the case for disturbance of common, the declaration states the plaintiff's right of common, appurtenant or in gross; the disturbance by the defendant; and the damage.

Proof of right of common.] The proof of a right of common, where there is no express grant, is much facilitated by 2 & 3 W. 4. c. 71., which enacts (sect. 1.) that no claim that may be lawfully made at common law by custom, prescription, or grant, to a right of common or other profit or benefit from or upon the land of another, except tithes, &c., shall, where such right shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated by shewing only that such right &c. was first enjoyed at any time prior to such period; but such claim may be defeated in any other way by which it is now liable to be defeated: and where such right shall have been so enjoyed for sixty years, it shall be deemed absolute and indefeasible, unless it shall appear that it was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

Sect. 4, 5, and 6. have been already in part recited, *antè*, p. 338.

By sect. 7. the time during which a person, otherwise capable of resisting a claim, shall have been an infant, idiot, non compos, covert, or tenant for life, or during which any suit shall have been pending and shall have been diligently prosecuted until abatement by death, shall be excluded in the computation of the above periods, except where the right is declared to be absolute and indefeasible.

The principal decisions upon this act will be found under the head *Case for Disturbance of Way*, *post*, p. 342.

The plaintiff need not prove his title to the same extent as he has set it out in his declaration; for the disturbance is the gist of the action, and the title is only inducement. *B. N.P.* 75, 76.; 1 *Saund.* 346. *a.* (n). Thus, if he states that he was possessed of a messuage and so many acres of land with the appurtenances, and by reason thereof ought to have common, &c., this allegation is divisible, and he may prove that he was possessed of the land only, and entitled to the common in respect of such land. *Ricketts v. Salwey*, 2 *B. & A.* 360. But though the right proved may be larger than the right alleged, it must be a right which includes the one alleged. *Bailey v. Appleyard*, 8 *A. & E.* 161.; and see, further, the cases cited *antè*, p. 62. An allegation of right of common for all the plaintiff's cattle, levant and couchant, is supported in evidence, although the common is not sufficient to feed all the cattle for any length of time. *Wilks v. Ward*, 2 *Chitty's Rep.*, 297. And an allegation of a right of common "for all commonable cattle, levant and couchant," is proved by a grant "of reasonable common of pasture." *Doidge v. Carpenter*, 6 *M. & S.* 47. An averment that the plaintiff was entitled to common of pasture for all his cattle, levant and couchant upon his land, is supported by evidence that the plaintiff was a part owner, with the defendant and others, of a common field, upon which, after the corn was reaped, and the field cleared, the custom was for the different occupiers to turn out in com-

mon their cattle, the number being in proportion to the extent of their respective lands within the common field, although such cattle were not maintained upon the land during the winter, and although the custom proved was to turn out according to the extent and not to the produce of the land in respect of which the right was claimed; and it was also held not to be necessary for the plaintiff to state his right to be with the exception of his own land, but that it was well laid to be over the whole common. *Cheesman v. Hardham*, 1 B. & A. 706. Where the plaintiff claimed a right of common for all his commonable cattle, and the proof was that he had turned on all the cattle he had kept, but had never kept any sheep, it was held that this was evidence of a right for all commonable cattle, to be left to the consideration of the jury. *Manifold v. Pennington*, 4 B. & C. 161. Where, in an action for disturbance by cattle, the defendant pleaded a right of common for cattle levant and couchant, to which the plaintiff replied that "all" the cattle mentioned in the declaration were not levant and couchant, it was held enough for the defendant to shew that some were levant and couchant; for the plaintiff ought to have new assigned a surcharge, or have replied that the "said cattle" were not levant &c., omitting the word "all." *Bowen v. Jenkin*, 6 A. & E. 911. Where the declaration alleged a right for all the freemen inhabiting within the borough of A., and it appeared that the limits of the borough were enlarged by the Municipal Amendment Act, 5 & 6 W. 4. c. 76., this was held a variance; for the right being prescriptive was confined to the ancient limits; and it was immaterial that the plaintiff in fact inhabited the old limits. *Beadsworth v. Torkington*, 1 Q. B. 782. A liberty to hunt, hawk, fish, and fowl is within sect. 1. of the Prescription Act, and may be exercised by servants. *Wickham v. Hawker*, 7 M. & W. 63.

Hearsay is admissible to prove a customary right of common, *ante*, p. 28., but not to prove a prescriptive right, strictly private. *Manifold v. Pennington*, 4 B. & C. 161.

The disturbance by the defendant.] This evidence is proper on a plea of Not guilty, which denies the wrongful act, and not the right. The action is maintainable against another commoner, as well as against a stranger; *Atkinson v. Teasdale*, 2 W. Bl. 817.; although the plaintiff himself has been guilty of a surcharge. *Hobson v. Todd*, 4 T. R. 71. But in an action against the lord, the plaintiff must allege a surcharge, and prove it, by shewing that there is not a sufficiency of common left for him. *Smith v. Feverel*, 2 Mod. 6.; 1 Saund. 846. b. (n). Where the lord has licensed a third person to put cattle on the common, the plaintiff may declare against him as a stranger for a disturbance generally; *Ibid.* *Hobson v. Todd*, 4 T. R. 73.; and it will, it seems, lie upon the defendant to prove the licence, and that he has not exceeded it, and has left sufficient of common for the plaintiff. 1 Saund. 346. b. (notes.)

Competency of witness.] A witness who claims common appurtenant has always been held competent for another party claiming the like sort of common; and, since 3 & 4 W. 4. c. 42. a customary commoner is equally competent to prove the custom. *Hoyle v. Coupe*, 9 M. & W. 450.; *Beadsworth v. Torkington*, 1 Q. B. 785 n. (a).

Damage.] In an action against a stranger, the smallest damage, as carrying away the dung from the common, is sufficient to maintain the action. *Pindar v. Wadsworth*, 2 East, 154. And in an action against another commoner for surcharging, it is sufficient to prove that the defendant put on the common more cattle than he had a right to do, without proving any specific damage. *Hobson v. Todd*, 4 T. R. 71.

Defence.

This being a possessory action, the defendant may shew (under a traverse of the right) that the common has been inclosed and held in severalty, adversely, for upwards of twenty years, which is a bar to the entry of the commoner. *Hawke v. Bacon*, 2 Taunt. 156. Or he may shew an extinction by unity of possession, &c.; and this may be shewn under a traverse of the right. *Post*, p. 343.

CASE FOR DISTURBANCE OF WAY.

In an action on the case for disturbance of a way, the declaration alleges possession of certain premises; a right of way appurtenant; and the disturbance by the defendant.

Proof of the way — Statute 2 & 3 W. 4. c. 71.] By the Prescription Act, 2 & 3 W. 4. c. 71. s. 2., a way or other lawful easement, or watercourse or use of water, having been actually enjoyed by a person claiming right thereto without interruption for the full period of twenty years, the right cannot be destroyed by shewing only that the way was first enjoyed at some time prior to such period; but it may be defeated in any other way in which it was liable to be defeated at the passing of that statute; and after the way shall have been so enjoyed for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that it was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing. In addition to the provisions in sect. 4, 5, 6, and 7. (recited *ante*, p. 338.), and which apply to ways and other easements, sect. 8. also provides that when land or water upon, over, or from which any way, or other convenient (easement?) watercourse, or use of water shall have been enjoyed or derived, has been held under any term of life, or years exceeding three years, the term of enjoyment during such term shall be excluded in the computation of the period of forty years, in case the claim shall, within three years next after the end or determination of the term, be resisted by a person entitled to any reversion expectant on it. So much of sect. 5. as prescribes the form of pleading the enjoyment "as of right" will be found under the head of *Trespass*. — *Plea, of Right of Way*.

Upon the construction of this statute the following decisions have occurred.

In order to establish a right of way by enjoyment for twenty years it must be proved that the claimant has enjoyed it for the full period required, and that he has done so "as of right." Therefore if the way shall appear to have been enjoyed by the claimant, not openly, and in the manner that a person rightfully entitled would have used it, but by stealth, as a trespasser would have done; if he shall have occasionally asked the permission of the occupier of the land, no title would be acquired. For the same reason it would not, if there had been unity of possession during all or part of the time; for then the claimant would not have enjoyed as of right the easement, but the soil itself. So it must have been enjoyed without interruption. Again, such claim may be defeated in any other way by which the same is now liable to be defeated; that is, by the same means by which a similar claim, arising by custom, prescription, or grant, would now be defeasible; and therefore it may be answered by proof of a grant; or of a licence, written or parol, for a limited period, comprising the whole or a part of the twenty years; or of the absence or ignorance of the parties interested in opposing the claim and their agents during the whole time that it was exercised. See the judgment of the court in *Bright v. Walker*, 1 C. M. & R. 219. Where, in an action of trespass, the defendants pleaded that they had for twenty years, as of right and without interruption, used a right of way, Parke B. observed, "the issue is whether the occupiers of the closes, of right and without interruption, have had the use and enjoyment, as they insist, under this issue: therefore they must shew an uninterrupted rightful enjoyment for twenty years. If they had enjoyed it for one week, and not for the next, and so on alternately, their plea would not have been proved. In the present case the permission asked for, and given, shews that the occupiers of the closes did not enjoy the way "as of right," "and that they also did not enjoy it uninterruptedly." Lord Lyndhurst C. B. also said, "the simple issue is, whether there has been a continued enjoyment of the way for twenty years; and any evidence negating the continuance is admissible. Every time that the occupiers asked for leave, they admitted that the former licence had expired and that the continuance of the enjoyment was broken." *Monmouth Canal Company v. Harford*, 1 C. M. & R. 631.

The enjoyment meant by the statute is an open, notorious one, without particular leave at the time, by a person claiming to use without danger of being treated as a trespasser, as a matter of right, whether strictly legal by prescription and adverse user, or by deed conferring the right; or, though not strictly legal, yet lawful to the extent of excusing a trespass, as by a consent or agreement in writing not under seal in case of a plea of forty years, or by such writing or parol consent or agreement, contract, or licence, in case of a plea of twenty years. See judgment of the court in *Tickle v. Brown*, 4 A. & E. 369. 382. Therefore, an annual payment for the use of the way will defeat an enjoyment for even forty years. S. C. So will proof of leave and licence. *Beasley v. Clarke*, 2 New Ca. 705. Proof that the plaintiff, before the commencement of the period, held the right under a lease, is evidence from which the jury may, if they think proper, infer a permissive enjoyment after its expiration. *Clay v. Shackeray*, 2 M. & Rob. 244. Unity of possession disproves the enjoyment of the easement as such. *Onley v. Gardiner*, 4 M. & W. 496.; *Clayton v. Corby*,

2 Q. B. 813. Where an easement has been enjoyed without the knowledge of either party, the user will not establish the right; as where the owner of a house, built twenty years ago on land excavated by a mine, claimed the easement of preventing his neighbour from mining in his own land so as to injure the house, it was held that the period did not begin to run until his neighbour was aware of the excavation under the house. *Partridge v. Scott*, 3 M. & W. 220. An enjoyment for fifty years down to within a few years before action brought, when it ceased, will not establish a right of way. *Parker v. Mitchell*, 11 A. & E. 788.

If there be ten years' enjoyment of a right of way, and then a cessation under a temporary agreement for another ten years, yet this may be a sufficient enjoyment of the old right for twenty years to make it indefeasible under the statute; for the agreement to suspend the enjoyment of the right, does not extinguish, nor is it inconsistent with the right. So if, instead of a direct path from A. to B., another track over the plaintiff's land from A. to C., and thence to B., had been substituted by the parol agreement of the parties for an indefinite time, yet the user of the substituted line may be considered as substantially an exercise of the old right, and evidence of the continued enjoyment of it. *Per Patteson J., Payne v. Shedden*, 1 M. & Rob. 383. So an alteration in part of the channel of a watercourse flowing over the plaintiff's land will not be such an interruption as will defeat the right or destroy the identity of the stream. *Semb. Hall v. Swift*, 4 New Ca. 381. Nor will an accidental natural interruption, as a dry season, defeat it. *S. C.* An interruption under this act must be by the owner of the *locus in quo* (i. e. of the servient land.) *Per Parke B. in Onley v. Gardiner*, 4 M. & W. 497. Where non-user of a way for a year is proved by the defendant, he may also prove payment of an acknowledgment for the user just before the non-user, in order to rebut the inference of a mere voluntary forbearance on the part of the claimant. *Tickle v. Brown*, 4 A. & E. 369.

By sect. 7., where the person, who ought to resist the claim of right, is under certain disabilities, or is tenant for life, the period of disability or of the life estate is to be excluded from the periods of twenty or of thirty years. If therefore any such disability occurs during the twenty or thirty years next before the suit, the claimant must make up the full period by proof of user before it began; and the whole period of twenty or thirty years so made up will be deemed to be next before the suit within the meaning of the act. Thus where defendant pleaded enjoyment of a profit in alieno solo for thirty years, to which the plaintiff replied a tenancy for life for twenty-five years out of the thirty, to which defendant rejoined that the life estate did not continue during the thirty years, and defendant proved an enjoyment from 1761 to 1785, and from 1834 till action brought in 1840, the defendant was held entitled to a verdict. *Clayton v. Corby*, 2 Q. B. 813. But, *semb.*, such disability will not prevent a legal interruption, submitted to during it, from defeating the claim. *Per Cur. ibid.*

Under sect. 8. a tenancy for term of life, or of years exceeding three, will be excluded from the computation of forty years (applicable to ways and watercourses), only on condition that the claim is resisted by the reversioner within three years after the determination of the term. *Wright v. Williams*, 1 M. & W. 77.

In *Bright v. Walker*, 1 C. M. & R. 219., a way had been used adversely for twenty years over land in possession of a lessee who held under a lease for lives granted by a bishop, and it was held that this user gave no right as against the bishop, and did not affect the see. It was also held that no right was gained as against the bishop's lessee. The grounds of this decision are thus explained by Parke B. in delivering the judgment of the court; "If the enjoyment takes place with the acquiescence or by the laches of one who is tenant for life only, the question is, what is its effect according to the true meaning of the statute 3 W. 4? Will it be good to give a right against the see, and those claiming under it by a new lease, or only against the termor and his assigns during the continuance of the term, or will it be altogether invalid? In the first place it is quite clear that no right is gained against the bishop; whatever construction is put on the seventh section, it admits of no doubt under the eighth." "It is quite certain that an enjoyment of forty years instead of twenty, under the circumstances of this case, would have given no title against the bishop, as he might dispute the right at any time within three years after the expiration of the lease; and if the lease for life be excluded from the longer period as against the bishop, it certainly must from the shorter. Therefore there is no doubt but that this possession of twenty years gives no title as against the bishop, and cannot affect the right of the see. The important question is, whether this enjoyment, as it cannot give a title against all persons having estates in the *locus in quo*, gives a title against the lessee and defendants claiming under him, or not at all?" "Upon the fullest consideration, we think that no title at all is gained by an user which does not give a valid title against all, and permanently affect the see. Before the statute this possession would indeed have been evidence to support a plea or claim by non-existing grant from the termor in the *locus in quo*, to the termor under whom the plaintiff claims, though such a claim was by no means a matter of ordinary occurrence; and in practice the usual course was to state a grant by an owner in fee to an owner in fee. But, since the statute, such a qualified right, we think, is not given by an enjoyment for twenty years. For in the first place the statute is for shortening the time of *prescription*, and if the periods mentioned in it are to be deemed new times of *prescription*, it must have been intended that the enjoyment for those periods should give a good title against all, for titles by immemorial *prescription* are absolute and valid against all. They are such as absolutely bind the land in fee. And in the next place the statute no where contains any intimation that there may be different classes of rights qualified and absolute, valid as to some persons and invalid as to others. From hence we are led to conclude that an enjoyment of twenty years, if it give not a good title against all, gives no title at all; and as it is clear that this enjoyment, whilst the land was held by a tenant for life, cannot affect the reversion in the bishop now, and is therefore not good against every one, it is not good as against any one, and therefore not against the defendant."

Right of way, how proved.] The proof of the right will, of course, depend upon the nature of the way claimed, and the foundation of the claim. A private way is usually claimed by grant, *prescription*, custom,

or by enjoyment, as of right, for twenty or forty years under the statute already referred to.

The particular description of way, as a cart-way, horse-way, or foot-way, must be proved; and evidence of user of a right of way for all manner of carriages, does not necessarily prove a right of way for all manner of cattle, though it is evidence to go to the jury. *Ballard v. Dyson*, 1 Taunt. 279. Where a way was stated to be for "horses, coaches, carts, and carriages," and the evidence was that carts of a particular description, and loaded in a particular manner, could not pass along the way, it was held to be no variance. *R. v. Lyon*, R. & M. 151. Evidence of user of a way with horses, carts, and carriages, for certain purposes, does not necessarily prove a right of way for all purposes, but the extent of the right is a question for the jury under all the circumstances of the case; and where the claimant uses it for all purposes for which he has occasion, it is evidence of a general right of way. *Cooling v. Higginson*, 4 M. & W. 245. A right of way to "lead" manure implies the use of carts, and is not proved by the grant of a foot-way, and way for horses and cattle. *Branton v. Hall*, 1 Q. B. 792.

The *termini* of the way, as stated in the declaration, must be proved. Thus the claim of a prescriptive right of way from A. over the defendant's close unto D., is not supported if it appear that a close, called C., over which the way once led and which adjoins to D., was formerly possessed by the owner of close A., and was by him conveyed in fee to another without reserving the right of way; for thereby it appears that the prescriptive right of way does not, as claimed, extend unto D., but stops short of it. *Wright v. Rattray*, 1 East, 377. See *Simpson v. Lewthwaite*, 3 B. & Ad. 226., *post*, title, "Trespass." The plaintiff might perhaps have alleged and established a right of way towards, but certainly not unto, the *terminus*. *Per* Lord Kenyon, 1 East, 381. The words "towards and unto" do not necessarily imply a straight road, but admit of angular deviations. *R. v. Marchioness of Downshire*, 4 A. & E. 232. Where the defendant in trespass prescribed in his plea for an occupation way from his own close, "unto, through, and over the said several closes, in which, &c., to and unto a certain highway," and it appeared at the trial that one of the intervening closes was in the possession of the defendant himself, the prescription was held to be proved. *Jackson v. Shillito*, cited 1 East, 381. Variances of this kind are now of less importance since the act for the amendment of them, *antè*, p. 67. If the declaration alleges the way to be enjoyed "by reason" of a message, it will not be supported by proof of a right independent of it. *Fentiman v. Smith*, 4 East, 107.

As to presumptive evidence of a grant of way, see *antè*, p. 22, 23.

Hearsay evidence is admissible to prove a public way; but not a private one, see *antè*, p. 28, 29, 30.

[*Disturbance by the defendant.*] The plaintiff must prove, on a plea of Not guilty, some disturbance by the defendant; and where the action is for a nuisance in a highway, he must prove the special damage if put in issue by the plea. *Wilkes v. Hungerford Market Co.*, 2 New Ca. 81.

Defence.

By the rules of H. 4. W. 4., in an action on the case for obstructing a right of way, the plea of the general issue will operate as a denial of the obstruction only, and not of the plaintiff's right of way.

The defendant may shew, on a traverse of the right, that it has ceased to exist; as that the way has been extinguished by an inclosure act, &c., or, if claimed by presumed grant, that during the adverse user the land was in the possession of a tenant. If the way is claimed as a way of necessity, the defendant may shew that the plaintiff can approach the place to which it leads over his own land, and that consequently the way of necessity has ceased. *Holmes v. Goring*, 2 Bing. 76. So he may prove that the way was only a way by sufferance during the pleasure of himself and the plaintiff; *Reignolds v. Edwards, Willes*, 282.; as evidence of which, he may shew that he has kept a gate &c. across the road, or that the plaintiff has paid him a compensation for the use of the way. He may also shew that the right of way has been renounced and abandoned by acquiescing in an obstruction for more than twenty years. *Bower v. Hill*, 1 New Ca. 555. But where a party was entitled to pass along a navigable drain from his land to the river, and the owner of the land lower down erected a permanent obstruction across the drain, it was held that the circumstance of part of the drain having been impassable for sixteen years from an accumulation of mud, did not deprive the party of his right to sue for such obstruction. *Ibid.* Where the plaintiff complains of an injury arising from an obstruction in a highway, the defendant may prove that, by using common caution, the plaintiff might have avoided it. *Butterfield v. Forrester*, 11 East, 60. The defendant may also prove a release of the right by a substantial alteration in the original object of the grant of way: thus where a way is granted to an open piece of ground "now used as a wood-house," the grantee, though not bound to continue to use it as a wood-house, cannot use the way for a dwelling-house built thereupon. *Allan v. Gomme*, 11 A. & E. 759.

Unity of possession is also an extinguishment of an easement; but where the party has different estates in the two pieces of land, as an estate in fee in the land over which, and a term of years in the land in respect of which, the easement exists, the easement is suspended only, and not extinguished. *Thomas v. Thomas*, 2 C. M. & R. 34.

The declarations of a previous occupier or tenant of the dominant tenement, that he was entitled to the way only by permission, were not evidence to defeat the claim of a way before 2 & 3 W. 4. c. 71.; but, *semb.*, they are admissible since that act. See *Tickle v. Brown*, 4 A. & E. 369. 378.; and *ante*, p. 36.

CASE FOR DISTURBANCE OF WATERCOURSE.

The principal allegations in the declaration are usually, 1. The possession of a mill, meadow, or other tenement, in respect of which the right of water is enjoyed; 2. The right to the water; 3. The disturbance; 4. The damage.

Proof of possession.] This must be traversed, and is not put in issue by a plea of Not guilty; and where the inducement unnecessarily and irrelevantly stated that a close therein mentioned was used as a private road, it was held unnecessary to prove such user. *Dukes v. Gosling*, 1 New Ca. 588.

Proof of the right to the water.] A traverse of the right does not put in issue the possession of the tenement in respect of which it is enjoyed. Nor does the plea of Not guilty put in issue the wrongfulness of the diversion. *Frankum v. Falmouth*, 2 A. & E. 453.

The provisions of the Prescription Act, 2 & 3 W. 4. c. 71., which apply to ways or watercourses, have been already referred to, *ante*, p. 338. 342., and the decisions on the statute upon rights of way are generally also applicable to rights of water.

When the right is enjoyed by some grant or licence unconnected with the land benefited by it, it is a variance to allege the enjoyment by reason of the possession of the land. *Fentiman v. Smith*, 4 East, 107.; *Hewlins v. Shippam*, 5 B. & C. 221. So where the plaintiff claimed a watercourse by reason of a mill, and the jury found a disturbance of the right as enjoyed before the erection of the mill, the finding was held not to support the claim. *Frankum v. Falmouth*, *ubi supra*. The right may be gained though the channel for the water be wholly artificial, and made for a different purpose; as where the owners of a brewery had enjoyed the use of water issuing for twenty years out of the mouth of a disused adit made to drain mines, it was held that the mine owners could not afterwards resume the working of the mines so as to infect the water. *Magor v. Chadwick*, 11 A. & E. 571. If however the adit water has been used with notice of the intention to resume the workings, or under circumstances from which such notice must be necessarily inferred, or if there be a local custom to resume them at any time, it seems that no right will be thereby gained. *S. C.*, and *Arkwright v. Gell*, 5 M. & W. 231; and *quare*, whether such a custom may not be shewn on a traverse of the right? *Magor v. Chadwick*, 11 A. & E. 572. n. (a).

A right to water is not destroyed by a partial alteration in the direction of the stream by the claimant; *Hall v. Swift*, 4 New Ca. 381; nor by an interruption occasioned by a dry season, *S. C.*; nor by an alteration in the machinery of the mill turned by it, if not prejudicial to others entitled to the same water. *Saunders v. Newman*, 1 B. & A. 258. Where the plaintiff, by oral licence, has permitted the defendant to erect a permanent work which has lessened the supply of water, he cannot

afterwards sue for the injury. *Liggins v. Inge*, 7 Bing. 682. See generally on the right to flowing water, *Mason v. Hill*, 5 B. & Ad. 1.

Proof of disturbance.] In an action for contaminating a well by erecting a cesspool near it, the plea of Not Guilty put in issue as well the fact of the erection as that of the consequent contamination. *Norton v. Scholefield*, 9 M. & W. 665. Where the plaintiff complained of a diversion of the water of his pond by cutting and continuing a sewer near it, and it appeared that the defendant had drained the pond before the sewer was made, in order to make it, but that the sewer when made did in fact prevent the pond from refilling, it was held that the alleged disturbance was proved. *Dukes v. Gostling*, 1 New Ca. 588. A slight temporary damage by muddying the water of a well will not support an action. *Taylor v. Bennett*, 7 C. & P. 329. So if the plaintiff takes water out of his stream and thereby withdraws some from the pond of another below, this is not actionable, unless there be a diversion of the stream. *Smart v. Stisted*, Com. Dig. *Action for Nuisance* (C.)

A reversioner may sue for damage done by the erection of a water-spout on the contiguous premises, if the jury find it to be injurious to the plaintiff's reversion. *Tucker v. Newman*, 11 A. & E. 40.

CASE FOR DISTURBANCE OF PEWS.

The declaration states the possession of a messuage; the right by reason thereof to use a pew in the parish church during service; and the disturbance of the right by the defendant.

Proof of the right to a pew.] The right must be by prescription or a faculty, and must be annexed to a particular messuage; mere user of a pew, however long, if unconnected with a particular house, is not sufficient evidence of a right. *Stocks v. Booth*, 1 T. R. 428.; *Mainwaring v. Giles*, 5 B. & A. 358. And even where the occupiers of a certain house have used a pew for many years, the jury are not bound to presume a faculty; *Morgan v. Curtis*, 3 M. & R. 389.; but they may be justified in presuming one; and long possession, without proof of the actual origin of it, will be evidence of a prescriptive right as against a wrong doer. *Griffith v. Matthews*, 5 T. R. 296.; *Rogers v. Brooks*, 1 T. R. 431. n. (a). Repairs done to the pew by the owner of the house are evidence of a prescriptive annexation to the house; but as against strangers, other than the Ordinary, such proof is not indispensable. *Kenrick v. Taylor*, 1 Wils. 326.

There may be a legal prescriptive right to a pew in the body of a church enjoyed in respect of a house out of the parish. *Lousley v. Hayward*, 1 Y. & J. 583. But see *Byerley v. Windus*, 5 B. & C. 1.

The use of a pew, being an easement enjoyed upon the land of another, appears to be within sect. 2. of the Prescriptive Act, 2 & 3 W. 4. c. 71.

CASE FOR INFRINGING PATENTS.

The declaration usually alleges, 1. That the plaintiff was the first inventor ; 2. The grant of the letters patent ; 3. The specification and enrolment thereof ; 4. The several breaches of the patent right complained of. The general issue only puts in issue the alleged breaches. The other allegations must be specially denied by other pleas. The following are some of the issues commonly raised in this action.

That the plaintiff is not the first inventor ; or the invention not new.] The plaintiff must, in the first instance, give slight evidence of the nature and novelty of the invention. *Turner v. Winter*, 1 T. R. 606. It is sufficient to call an experienced person, who will say that he never heard of the invention before. *Manton v. Manton*, Dav. Pat. Ca. 350. A manufacture newly imported into this kingdom is new within the patent. *B. N. P.* 75. To invalidate the claim of novelty, it is not enough to shew that such an article had been made before by another person, if never brought into public use, nor seen by the plaintiff. *Lewis v. Marling*, 10 B. & C. 22. ; *Jones v. Pearce*, *Godson on Patents*, Suppl. p. 10. But the prior use may avoid it, though not general ; it is enough that the use was not in secret. *Carpenter v. Smith*, 9 M. & W. 300. ; and, *per* Lord Abinger C. B., " The cases of *Lewis v. Marling*, and *Jones v. Pearce*, proceeded on the ground of the former machines being, in truth, mere experiments which failed." Where the claim is of a new process, it is not supported by proof of an improvement in an old process. *Gibson v. Brand*, 4 M. & G. 179. 198. Where the invention claimed was an improved construction of chairs, and the defendant both denied the invention and that the specification described it, and the jury found that another person, B., had before invented and sold chairs on the same principle, but that the plaintiff had discovered the " practical purpose to which it is now applied : " Held, that the plaintiff was not entitled to a verdict ; the description in the specification being one which in fact included the prior invention of B. *Minter v. Mower*, 6 A. & E. 735. Prior publication in a book is a sufficient answer to the novelty. *Dr. Brewster's* case, cited by Alderson B., 2 M. & W. 553—4. But it is no answer that, since the grant of the patent and before the enrolment of the specification, another has enrolled a patent for the same discovery. *Cornish v. Keene*, 3 New Ca. 570. 588.

Proof of letters patent.] See *antè*, p. 73.

Proof of enrolment of a specification.] The enrolment is to be proved by an examined copy of the original on the rolls of the court of Chancery.

That the specification does not truly describe the invention or how it is to be performed.] The specification stated the use of bituminous schistus, and that, before it is used, the sulphuret of iron should be separated from it : On the trial it appeared that all such schistus in this country

was found combined with that sulphuret: Held, that, as the plaintiff had not stated in his specification the mode of separation, he must shew by evidence either that the presence of the sulphuret was immaterial, or that the process of separation was simple and well known in trade. *Derosne v. Fairie*, 2 C. M. & R. 476. Where the specification stated the use of "gunpowder or other proper combustible" in making a patent safety fuse, it was held enough for the plaintiff to shew that some other such combustible might be used, though it had never in fact been used, for the fuse; but if nothing but gunpowder could be used, then the defendant would be entitled to a verdict. *Bickford v. Skewes*, 1 Q. B. 938. Whether the materials used come within the description, or whether those described will answer the purpose, is a question for the jury. *S. C. Ibid.* But the construction of the specification is for the court. *Neilson v. Harford*, 8 M. & W. 806. A variance between the title of the patent and the specification cannot be shewn on pleas denying a true specification or the enrolment of such specification. *Semb. Derosne v. Fairie, ubi supra.*

Illegality or inutility of the invention.] These defences must be shewn by special pleas. And it is enough to shew the fact as to part of the alleged invention; see *Morgan v. Seaward*, 2 M. & W. 544. And the inutility seems to avoid a patent by making it prejudicial, and therefore illegal, under stat. 21 Jac. 1. c. 3.; *per Parke B. Ibid.* But where a plea alleged that the patent was "inconvenient to the king's subjects in general," Buller J. thought there was no distinct issue which the plaintiff could be prepared to answer, and therefore refused to hear evidence on it. *R. v. Arkwright, B. N. P. 77.*

Breach of the patent.] A slight deviation from the process described in the specification, for the purpose of evading the patent, is a fraud. The question is, whether the defendant's mode is substantially different. Dallas C. J. in *Hill v. Thompson*, 8 Taunt. 391. Where the breach was that the defendant had, directly and indirectly, used the plaintiff's invention, and it appeared that the defendant had got other manufacturers to use the plaintiff's process, and then received and sold the goods so manufactured, the breach was held to be proved. *Gibson v. Brand*, 4 M. & G. 179. In a case in which the patent was for making ropes in a particular way, and the rope made by the defendant and produced by the plaintiff appeared on inspection to agree in its peculiarities with those made by the plaintiff's machinery, and the defendant had refused to permit the plaintiff to see his mode of making them, Lord Ellenborough held that this was presumptive proof that he made them by the plaintiff's process. *Huddart v. Grimshaw, Davis Pat. Ca. 288.*, cited *Godson on Patents*, p. 180.

Notice of objections.] By 5 & 6 W. 4. c. 83. s. 5., the defendant, on pleading to the action, shall give the plaintiff a notice of any objections on which he means to rely on the trial; and no objection shall be allowed on behalf of the defendant, unless he prove the objections stated in such notice; but the notice of objections may be altered on summons before a judge at chambers.

The notice should be more particular than the pleas, but, if too general, it is no ground of objection to it on the trial. The plaintiff

should apply to a judge for a better particular. *Neilson v. Harford*, 8 M. & W. 806.

[*Certificate.*] By sect. 3., if a verdict passes for the patentee or his assigns, it shall be lawful for the judge who tried the cause to certify on the record that the validity of the patent came in question before him, and this record, being given in evidence in any future action touching the same patent, shall entitle the patentee or his assigns to treble the taxed costs if he recovers a second time, unless the judge who tries the second action certifies that he ought not to have them.

By sect. 6., in taxing costs regard shall be had to the part of the case proved at the trial, which shall be certified by the judge who tried the action, regard being had to the notice of objections as well as the counts, and without regard to the general result of the trial.

This certificate should be upon each of the objections mentioned in the notice, and not merely upon the issues, as to which the statute has made no difference in the law. *Losh v. Hague*, 5 M. & W. 387.

CASE FOR NEGLIGENCE.

The evidence under this head depends upon the nature of the grievance complained of, but, in general, it involves proof of the defendant's negligence under circumstances which make negligence a breach of his duty, and of the damage sustained by reason of it. The following are some of the most usual causes of action.

[*Negligent driving, &c.*] In general where a servant is guilty of negligence in driving his master's carriage, the latter is answerable in an action on the case, and an allegation that the defendant negligently drove, &c. is supported by evidence that his servant was the driver. *Brucker v. Fromont*, 6 T. R. 859. But a master is not answerable for the wilful and malicious act of his servant. *M'Manus v. Crickett*, 1 East, 106. Thus where the defendant's servant wantonly, and not for the purpose of executing his master's orders, strikes the plaintiff's horses and thereby produces the accident, the master is not liable; but where in the course of his employment he so strikes, although injudiciously, his master is liable. *Croft v. Alison*, 4 B. & A. 590. Where A. and B. were jointly interested in the profits of a common stage-waggon, but, by a private agreement between themselves, each undertook the management of the waggon with the driver and horses for a specified distance, it was held by Gibbs C. J. that they were, notwithstanding this private agreement, jointly responsible to third persons for the negligence of their drivers throughout the whole distance; and that an averment that the negligence was occasioned by the driver of A. (against whom alone the action was brought) was supported by proof that the driver was actually employed by B. in conducting the waggon for his own stages. *Waland v. Elkins*, 1 Stark. 272; *Fromont v. Coupland*, 2 Bing. 170. Where a stable-keeper let horses to a person to draw his carriage to Epsom, and the horses were driven by the servant of the stable-keeper, Lord Ellenborough was of opinion that the latter

was liable for any accidents occasioned by the post-boy's misconduct on the road; *Dean v. Branthwaite*, 5 Esp. 35.; *Sammell v. Wright*, id. 263.; *Sir H. Houghton's case*, cited 5 B. & C. 550.; *Smith v. Lawrence*, 2 M. & R. 1.; and where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for the day, and the owner of the horses provided a driver, who received no wages but a gratuity from the owner of the carriage, and who was guilty of negligent driving, it was held by Abbott C. J., and Littledale J., Bayley and Holroyd J. J., *dis.*, that the owner of the carriage was not liable to be sued for such negligence; *Laugher v. Pointer*, 5 B. & C. 547.; and the opinion of Abbott C. J., and Littledale J., has been adopted and confirmed by the court of Exchequer in *Quarman v. Burnett*, 6 M. & W. 499.; nor does it make any difference that the driver was provided, during the drive, with livery belonging to the owner of the carriage, and that the accident happened by the driver leaving the carriage while returning the livery. *S. C.* But where the defendant, the owner of the carriage, sat on the box, and did not interpose to prevent the postilions from forcing their way among other carriages, by which the injury was done, and afterwards admitted his responsibility, this was held to be evidence of a joint act by the defendant and postilions for which trespass lay, *M'Laughlin v. Pryor*, 4 M. & G. 48. In an action on the case for damage done to the plaintiff's cabriolet from the negligence with which the defendant's cart was driven, the defendant will be liable, although it should appear that the defendant's servant was not driving at the time of the accident, but had entrusted the reins to a stranger who was riding with him, and who was not in the service of the defendant, *Booth v. Myster*, 7 C. & P. 66. In case for negligence against the proprietors of a stage-coach, where it appeared in evidence that one of the defendants was driving at the time when the accident happened, the jury having found that it happened through his negligent driving, it was held that the plaintiff might maintain *case* against all the proprietors, though he might perhaps have been entitled to sue the one who drove in trespass. *Moreton v. Hardern*, 4 B. & C. 223.; and see *post*, "*Trespass*."

In order to prove the ownership of a stage-coach, it was held sufficient to show the inscription on it of the name of the party licensed to use it under 50 Geo. 3. c. 48. s. 7. *Barford v. Nelson*, 1 B. & Ad. 571. But that act was repealed by 2 & 3 W. 4. c. 20., which does not repeat this provision.

In an action for negligent driving, actual negligence must be proved, and it is not sufficient merely to show an accident, unless it be of such a nature as to afford a presumption of negligence. Proof that a stage-coach broke down raises a presumption that the accident arose either from the unskillfulness of the driver, or the insufficiency of the coach. *Christie v. Griggs*, 2 Camp. 79.; *Curtis v. Drinkwater*, 2 B. & Ad. 166. And the owner is liable for the insufficiency of the coach, although the defect be out of sight, and not discoverable upon ordinary examination. *Sharp v. Grey*, 9 Bing. 457. Where a coach, which is overloaded, breaks down, the excess in the number of passengers has been held to be conclusive evidence of the accident having arisen from the overloading. *Israel v. Clark*, 4 Esp. 259. But where the injury is the result of mere accident, no action lies; thus where the coachman was driving in the middle of the road, and not on his own side, but there

were no other coaches on the road, and the horses took fright and overturned the coach, it was held to afford no evidence of negligence. *Aston v. Heaven*, 2 Esp. 533. ; *Wakeman v. Robinson*, 1 Bing. 213. So where the accident arises from foggy weather, or the removal of accustomed landmarks. *Crofts v. Waterhouse*, 3 Bing. 319, 321. In *Wordsworth v. Willan*, 5 Esp. 273., the rule with regard to keeping the road is said to be, that if a carriage coming in any direction leaves sufficient room for any other carriage, horse, or passenger, on its side of the way, it is sufficient; and in *Wayde v. Lady Carr*, 2 D. & R. 256, the court said that, whatever might be the law of the road, it was not to be considered as inflexible, since in crowded streets situations and circumstances might frequently arise where a deviation from what is called the law of the road would not only be justifiable but absolutely necessary. Where the defendant was driving on the wrong side of the road, which was of considerable breadth, and the plaintiff's servant, who was on horseback, without any reason crossed over to the side on which the defendant was driving, and, on endeavouring to pass, his horse was killed, Lord Kenyon held that it was putting himself voluntarily into danger, and that the injury was of his own seeking; but the jury found a verdict for the plaintiff, which the court of K. B. refused to disturb. *Cruden v. Fentham*, 2 Esp. 685. And although a person is not bound to confine himself to the ordinary side of the road, yet if he does not, he is bound to use a greater degree of care to avoid accidents than if he kept the proper side. *Pluckwell v. Wilson*, 5 C. & P. 375.

In order to subject the master to damages, it must appear that there has been something to blame on the part of his servant; and he is blameable if he has not exercised the best and soundest judgment on the subject. Per Lord Ellenborough C. J., *Jackson v. Tollett*, 2 Stark. 39. The coachman must have competent skill, and must use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses; a coach and harness of sufficient strength and properly made; and also with lights by night. Per Best C. J., *Crofts v. Waterhouse*, 3 Bing. 321. If the driver may adopt either of two courses, one of which is safe and the other hazardous, and he elects the latter, he is responsible for the mischief which ensues. *Mayhew v. Boyce*, 1 Stark. 423. If the driver of a stage-coach neglects to inform an outside passenger of his danger where the way passes through a low archway, the owner of the coach is liable for the damage. *Dudley v. Smith*, 1 Camp. 167. A passenger being, in consequence of the negligence of the defendant, placed in a situation which obliges him to adopt the alternative of leaping from the coach, or remaining at certain peril, leaps, and is hurt: the defendant is liable, if it appears that the leaping was a prudent precaution for the purpose of self-preservation. *Jones v. Boyce*, 1 Stark. 493.

The defendant's servant who drove the carriage is a competent witness to disprove the negligence since the statute 3 & 4 W. 4. c. 42. s. 26. without releasing him. *Yeomans v. Legh*, 2 M. & W. 419. But see *Boorman v. Brown*, 9 A. & E. 487. 497.

[Running down ships.] In *Fennell v. Garner*, 1 C. & M. 21., it was held that the plaintiff was entitled to recover, although he might have prevented the collision, if the defendant's ship ought, under the circumstances, to have given way; for the plaintiff had a right to presume

that the defendant would have given way, and so prevented the accident. The general rule seems to be that where two ships are approaching each other, the ship on the larboard tack ought to give way, and that on the starboard tack to hold on; and where two steamers are approaching in a straight line, each is to put the helm a-port. This rule is constantly laid down in the Court of Admiralty. See *The Ann and Mary*, Adm. Nov. 3. 1843, and the *Traveller*, Nov. 24., *Jurist*, vol. vii. p. 999, 1094. Where the plaintiff has, by his own culpable negligence, substantially contributed to the accident, he cannot recover. *Vennall v. Garner*, *supra*; *Sills v. Brown*, 9 C. & P. 601.; *Smith v. Dobson*, 3 M. & G. 59. See, however, *Bridge v. Grand Junction Railway Co.*, 3 M. & W. 244., cited *post*, p. 357, 358. It is no defence that the vessel became unmanageable by reason of a previous accident happening by the neglect of the crew. *Secombe v. Wood*, 2 M. & Rob. 290. The master is not liable for the wilful act of the crew, though he was on board at the time. *Boucher v. Noidstrom*, 1 Taunt. 568.

Defendants are not entitled to deduct from the damages money paid to the plaintiff by insurers for the same damage. *Yates v. Whyte*, 4 New Ca. 272.

Liability for damage by animals.] The owner of a wild animal, as a lion, or bear, which escapes and does damage, is liable without any proof of notice of the animal's ferocity; but where the damage is done by a domestic animal, as a bull, a dog, &c., the plaintiff must shew that the defendant knew the animal was accustomed to do mischief; *R. v. Huggins*, 2 Ld. Raym. 1583; *B. N. P.* 76.; and if a man keeps a dog which is accustomed to bite sheep, &c., and the owner knows it and notwithstanding keeps the dog still, and afterwards the dog bites a horse, this is actionable. *Per Powell J., Jenkins v. Turner*, 1 Ld. Raym. 110. Where the allegation in the declaration was, that the dog was accustomed to bite mankind, and that the defendant knew it, it was held by Abbott J. that proof that the defendant had warned a person to beware of the dog, was evidence to go to the jury in support of the allegation; *Judge v. Cox*, 1 Stark. 285.; though where it was alleged that the defendant knew that the dog was accustomed to bite sheep, the court held that proof that the dog had jumped at a man, and had chased sheep, was not evidence to support the action. *Hartley v. Halliwell*, 2 Stark. 214., S. C. 1 B. & A. 620. So in an action for keeping a dog which bit the plaintiff, Lord Ellenborough held it not to be sufficient to shew that the dog was of a fierce and savage disposition, and usually tied up by the defendant, and that the defendant had promised to make a pecuniary satisfaction to the plaintiff. *Beck v. Dyson*, 4 Camp. 198. But in the later case of *Thomas v. Morgan*, 2 C. M. & R. 496., such an offer to make satisfaction was held to be evidence, though very slight, of the scienter. See also 2 Stark. 214. (n). Where a dog has once bitten a man, and the owner, having notice thereof, lets him go about, or lie at his door, an action will lie against him by a person who is bit, though it happened by such person treading on the dog's toes; for it was owing to the defendant not hanging the dog. *Smith v. Pelah*, 2 Stra. 1264. So where the defendant's dog was reported to be mad, and the defendant tied him up, but he broke loose and bit the plaintiff's child, who died

in consequence, it was held that the defendant was liable in damages to the amount of the apothecary's bill for attending the child; and Lord Kenyon admitted evidence of reports in the neighbourhood that the dog had been bitten by a mad dog, to prove the *scienter*. *Jones v. Perry*, 2 Esp. 482., differently reported, *Peak, Ex. 292.*, 5th edit. But if a dog, accustomed to bite, be let loose at night for the protection of the defendant's yard, and the injury arise from the plaintiff incautiously going into the yard after it has been shut up, no action will lie. *Brock v. Copeland*, 1 Esp. 203. A person has a right to keep a fierce dog to protect his property, but not to place it in the approaches to his house, so as to injure persons exercising a lawful purpose in going along those paths to the house. *Per Tindal C. J., Sarch v. Blackburn, M. & M.* 505.; see also *Blackman v. Simmons*, 3 C. & P. 138. The principle of these cases was discussed in *Bird v. Holbrook*, 4 Bing. 628., where it was held that any one, who for the protection of his property sets a spring-gun without notice in a walled garden, is answerable in damages to a person, who, having climbed over the wall in search of a strayed fowl, is injured by the gun. See however the remarks made upon this case in *Jordin v. Crump*, 8 M. & W. 782.

The general issue puts in issue not only the biting, or other injury, but also the *scienter*. *Thomas v. Morgan*, 2 C. M. & R. 496.

[*Accidents from neglect of inclosure, repairs, &c.*] Where the tenant of a house was bound to repair it, but the landlord superintended the repairs, and the cellar was left in a dangerous state whereby an accident happened, the landlord was held liable. *Leslie v. Pounds*, 4 Taunt. 649.; *Payne v. Rogers*, 2 H. Bl. 349. So where the defendant had employed a bricklayer to make a sewer, who left it open, in consequence of which the plaintiff fell in and broke his leg, the defendant was held liable; *Sly v. Edgley*, 6 Esp. 6.; so the occupier of a house is bound to rail in the area, and if an accident happen, it is no defence that the premises had been in the same situation for many years before the defendant came into possession of them. *Coupland v. Hardingham*, 3 Camp. 398: Where A. employed B. to repair his (A.'s) house for a stipulated sum; and B. contracted with C. to do the work, and C. with D. to furnish the materials, and the servant of D. brought a quantity of lime to the house and placed it in the road, by which the plaintiff's carriage was overturned, it was held that A. was liable for this damage. *Bush v. Steinman*, 1 B. & P. 404. So where an incorporated water-works company contracted with certain pipe-layers to lay down pipes, and the pipe-layers employed workmen by whose negligence an accident happened, Lord Ellenborough held the company liable. *Matthews v. West London Water-works Co.*, 3 Camp. 403. See also *Randleson v. Murray*, 8 A. & E. 109.

The principle of some of the above cases has been doubted, but they are founded on the rule that the occupier of fixed property must take care so to use and manage it as not to injure others, whether by his own servants or by others whom he brings on the premises. See the judgment of Littledale J., in *Laugher v. Pointer*, 5 B. & C. 547., and *Quarman v. Burnett*, 6 M. & W. 499. But in other cases the action lies only against the person who, by himself or his servant committed the injury; and a sub-contractor or other person exercising an independent employment is not a servant within the meaning of th

rule, so as to render his employer liable. *Rapeon v. Cubitt*, 9 M. & W. 710.; *Milligan v. Wedge*, 12 A. & E. 737. A. contracted with the Postmaster general to provide mail-coaches; and B. contracted to supply horses and drivers: the plaintiff was hired by B. to drive one of the coaches, and in such employment met with an accident from a defect in the coach: Held, that he could not sue A. *Winterbottom v. Wright*, 10 M. & W. 109. Where the defendant sold a gun to A. for the plaintiff's use, and falsely and fraudulently warranted its soundness knowing it to be unsound, the plaintiff may sue the defendant for an injury done to him by its bursting. *Langridge v. Levy*, 2 M. & W. 519. aff. on error, 4 M. & W. 337.

[*Liability of innkeeper.*] The liability of an innkeeper very closely resembles that of a carrier, *post*, p. 358. *et seq.* He is *primæ facie* liable for any loss not occasioned by the act of God, or the king's enemies, though he may be exonerated where the guest chooses to have the goods under his own care. *Per* Bayley J., *Richmond v. Smith*, 8 B. & C. 11. He is liable for money as well as goods. *Kent v. Shuckard*, 2 B. & Ad. 803.; *Doorman v. Jenkins*, 4 Nev. & M. 170. Where a traveller desired to have his luggage taken into the commercial room, whence it was stolen, it was held that the innkeeper was liable, though he proved that, according to the usual practice of his house, the luggage would have been carried into the traveller's bed-room, if no order had been given. *Richmond v. Smith*, 8 B. & C. 9. But where a traveller engaged a private room for the purpose of showing his goods, and was told that there was a key in the door, it was held that, as he had taken the goods under his own custody, the innkeeper was not liable. *Burgess v. Clements*, 4 M. & S. 306. An innkeeper, on a fair day, placing a gig belonging to a guest in the open street, where, on such occasions, he was accustomed to place carriages, is liable if the gig is stolen. *Jones v. Tyler*, 1 A. & E. 522.

Defence.

The plea of Not guilty operates as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the indorsement. All matters in confession and avoidance shall be pleaded specially, as in assumpsit. R. H. 4 W. 4.

In an action against coach proprietors for negligence, the defendants may show that the damage was occasioned by mere accident; *vide supra*, p. 353.; and where the plaintiff rests his case on the presumption of negligence arising from the fact of the coach breaking down, the defendant may shew that the coach was examined a few days before the accident, and no flaw discovered; and that the coachman, a skilful driver, was driving in the usual track and at a moderate pace. *Christie v. Griggs*, 2 Camp. 81. The defendant may shew that the immediate and proximate cause of the injury was the unskilfulness or negligence of the plaintiff; *Flower v. Adam*, 2 Taunt. 315.; *Williams v. Holland*, 10 Bing. 112. *Vennall v. Garner*, 1 C. & M. 21.; and this is evidence on Not guilty; *Bridge v. The Grand Junction Railway Co.*, 3 M. & W. 244.; in which case Parke B. states the rule to be that, although there may have been negligence on the part of the

plaintiff, yet, unless he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover : if by ordinary care he might have avoided this, he is the author of his own wrong : that is the only way in which the rule as to the exercise of ordinary care is applicable to questions of this kind. Where the plaintiff had improperly left an ass on the high road, and the defendant by negligently driving too fast ran over and killed it, he was held liable to the owner of the ass. *Davies v. Mann*, 10 M. & W. 546. Where the defendant negligently left a cart and horse in a public street, and one of two children improperly playing with the cart met with an accident by falling from it whilst the other was driving the horse on, it was held that the injured child might sue the defendant in case. *Lynch v. Nurdin*, 1 Q. B. 29. In *Vaughan v. Menlove*, 7 C. & P. 525., where the defendant was held liable for damage occasioned to the plaintiff's property from the defendant's hay-rick having ignited owing to being carelessly put together, Patteson J. directed the jury to consider whether the defendant had acted as a man of ordinary skill and prudence would have acted, or whether through his negligence and carelessness the plaintiff's property has been consumed. It was not enough that the defendant had acted *bonâ fide*, for if by his injudicious want of care the injury had been occasioned, he was liable to the action. *S. C.* 3 New Ca. 468. Where the declaration alleges by way of inducement that the defendant was possessed of a carriage, and then states the negligent driving &c., the plea of Not guilty does not put in issue the property of the carriage ; and *quære*, whether it would have done so if the plaintiff had omitted the inducement, and only stated the driving of the "defendant's carriage" ? *Taverner v. Little*, 5 New Ca. 678. ; *Hart v. Crowley*, 12 A. & E. 378.

In an action for negligently keeping a mischievous animal, it is a good defence that the animal was properly at large, and that the accident happened by the plaintiff's own misconduct. *Brock v. Copeland*, 1 Esp. 203. ; *Deane v. Clayton*, 1 B. Moore, 225. 245.

CASE AGAINST CARRIERS.

In an action on the case against a carrier for not carrying goods safely, the plaintiff may have to prove that the defendant is a carrier ; the contract for carriage ; the delivery of the plaintiff's goods to him ; and the loss of them, or other injury.

The defendant's character as carrier.] This is admitted unless specially traversed. The proprietors of stage-coaches carrying goods ; the owners and masters of vessels ; *Morse v. Sluc*, 2 Lev. 69. ; hoymen ; *ibid.* ; *Wardell v. Mourillyan*, 2 Esp. 693. ; *Maving v. Todd*, 1 Stark. 72. ; wharfingers and bargemen ; *Rich v. Kneeland*, Cro. Jac. 330., are all liable as common carriers. But it was ruled by Lord Abinger that a carman, whose carts ply for hire near the wharfs, and who lets them by the hour, day, or job, is not a common carrier. *Brind v. Dale*, 2 M. & Rob. 80. A carrier is in the nature of an insurer, and liable for every accident, except by the act of God or the king's enemies.

Per Lord Mansfield, *Forward v. Pittard*, 1 T. R. 33. He is, therefore, liable for accidental fire. *Ibid.* Where a private person undertakes the carriage of goods he is liable, not as a common carrier, but according to the terms of his contract. *Coggs v. Bernard*, 2 Ld. Raym. 909. Where the only proof of the defendant being a carrier from London was that he kept a booking-office, and that on a board at the door were painted the words, "Conveyances to all parts of the world," Lord Tenterden was of opinion that this was not sufficient; there being in London booking-offices not belonging to carriers. *Upston v. Stark*, 2 C. & P. 598.; and see *Gilbart v. Dale*, 5 A. & E. 543., *post*, 360.

Evidence of the contract.] There is generally no other proof of contract than that which is implied by law, and, where the action is in tort and not assumpsit, a duty, and not a contract, is alleged.

Where the action is in assumpsit, defendant may shew on the general issue that he is exempted from liability, in respect of the particular goods by act of parliament; and where the act only makes the defendants liable for articles of clothing, the plaintiff must shew that the goods lost were such articles, or that there was a special contract. *Elwell v. Grand Junction Railway Co.*, 5 M. & W. 669. Where carriers undertake to keep the goods in their warehouse for a certain period till called for, they are not gratuitous bailees during that time, but their charge as carriers includes warehouse rent. *Cairns v. Robins*, 8 M. & W. 258. When a parcel is booked at the defendant's railway-station for carriage to D, a place on another railway communicating with the first, but a distinct concern, this is evidence of a contract to convey it to D, unless the defendants expressly limit their contract to their own railway. *Muschamp v. Lancaster and Preston Railway Co.*, 8 M. & W. 421. It is the duty of a book-keeper to deliver to the carrier; but he is not liable for loss by the carrier. *Gilbart v. Dale*, 5 A. & E. 543. Where, in order to prove the contract, the carrier's receipt for the goods is offered in evidence, it does not require a stamp, if the carriage does not exceed 20*l.* though the value of the goods is above that sum. *Latham v. Rutley*, R. & M. 13.

The *termini* of the journey must be proved as laid. *Tucker v. Crackin*, 2 Stark. 385. But where it was averred that the plaintiff delivered to the defendant a trunk to be put into a coach at Chester, in the county of Chester, to wit, at, &c., and safely carried to Shrewsbury, and it appeared in evidence that the trunk was delivered to the defendant at the *city of Chester*, which is a county of itself, separate from the county of Chester at large but within its ambit, it was held that this was not a material variance. *Woodward v. Booth*, 7 B. & C. 301. And where the *terminus a quo* was stated to be London, Lord Tenterden held it sufficient to prove that the coach went from a part of the town usually called London, as Piccadilly. *Beckford v. Cruwell*, 1 M. & Rob. 187., *ante*, p. 60. 67.

Where goods are forwarded on approval, the consignor is the proper party to sue the carrier for the loss. *Swain v. Shepherd*, 1 M. & Rob. 223. But the consignee is usually the proper party, unless there be a special contract between the consignor and carrier, in which case the ownership is immaterial. *Dunlop v. Lambert*, 6 Cl. & Fin. 800. A special property is sufficient; thus a laundress who returns clothes by a carrier, who loses them, may maintain the action. *Freeman v. Birch*,

1 *Nev. & M.* 420. Where the contract is expressly made with the plaintiff, he need not prove that the goods are his property; but where the action is brought on the implied contract with the owner of the goods to carry them safely, the plaintiff must prove that he is owner, of which the bill of lading, if there be one, will be evidence. *Brown v. Hodgson*, 2 *Camp.* 36.; *Dawes v. Peck*, 8 *T. R.* 330.

If a man travel in a stage-coach and take his portmanteau with him, though he has his eye on the portmanteau, yet the carrier is not absolved from responsibility, but will be liable if the portmanteau be lost. *Per Chambre J.*, *Robinson v. Dunmore*, 2 *B. & P.* 419.; see *Middleton v. Fowler*, 1 *Salk.* 282.; *Brook v. Pickwick*, 4 *Bing.* 218., *S. C.* 12 *B. Moore*, 447. Unless the owner has undertaken to watch; which will be a defence under the general issue. *Brind v. Dale*, 2 *M. & W.* 775. Where the action is for refusing to carry, the plaintiff need not aver or prove a strict tender; it is enough that he was ready to pay. *Pickford v. Grand Junction Railway Co.*, 8 *M. & W.* 372. But where the defendant has limited his liability unless a certain charge is paid, payment of that charge must be proved. *Wylde v. Pickford*, *Id.* 443. A carrier is liable even without reward, if he has been grossly negligent. *Beauchamp v. Pouley*, 1 *M. & Rob.* 38.

Delivery to defendant.] In an action against the proprietor of a stage-coach for the loss of a parcel, it is sufficient to prove a delivery of the parcel to the driver. *Williams v. Cranston*, 2 *Stark.* 82. Unless it appear that the delivery was not in the ordinary course of business, but to the driver for his own gain. *Buller v. Basing*, 2 *C. & P.* 613. A delivery of goods on board ship must be to some officer accredited for that purpose; as to the mate. *Cobban v. Downe*, 5 *Exp.* 41. If the master receive goods at the quay or beach, or send his boat for them, the owner's responsibility commences with the receipt; *Abbott on Ship.*, citing *Molloy*, b. 2. c. 2. s. 2.; *Fragano v. Long*, 4 *B. & C.* 219; unless it appear that the consignor does not intend to trust him with the custody; as where he is in the habit of sending his own servant in charge of the goods, who has the exclusive management of them. *East India Company v. Pullen*, 2 *Str.* 690. Where the only proof of delivery was, that the goods were left at the inn-yard where the defendant and other carriers put up, it was held to be insufficient. *Selway v. Holloway*, 1 *Ld. Raym.* 46. So leaving goods at a wharf, piled up amongst other goods, without communication with any one there, is not a delivery to the wharfinger. *Buckman v. Levi*, 3 *Camp.* 414. So leaving them with a book-keeper. *Gilbart v. Dale*, 5 *A. & E.* 543.

Proof of the loss.] Slight evidence of the loss will be sufficient in the absence of all proof on the part of the defendant. Thus where the plaintiff's shopman was called, who stated that he did not know of the delivery, and that the parcel could not have been delivered without his knowledge, *Hullock B.* held this sufficient to call on the defendants to prove a delivery. *Griffiths v. Lee*, 1 *C. & P.* 110. Evidence of delivering at a general booking-office for the transmission of parcels by coaches, with proof of the non-arrival of the goods, is not sufficient against the proprietor of the booking-office; as his duty is only to deliver to a carrier, and it must be shewn that the loss happened by breach of that duty. *Gilbart v. Dale*, 5 *A. & E.* 543.

The liability of a carrier continues till delivery to the plaintiff. Therefore where goods are destroyed by fire after they are deposited in the defendant's wharf, and before a reasonable time has elapsed for the plaintiff to fetch them, the defendant is liable. *Bourne v. Galliffe*, 3 M. & G. 643. And where the question is, whether the goods have been delivered by the defendant at London, evidence is admissible to shew what constitutes a delivery in London according to the usage of that port; and former dealings between the plaintiff and defendant are evidence of such usage. *S. C. Ibid.*

The declarations of the coachman respecting the loss of a parcel are evidence against the carrier. *Mayhew v. Nelson*, 6 C. & P. 58.

Defence.

By the new rules, H. T. 4 W. 4., the plea of *Not guilty* in this action operates as a denial of the loss or damage; but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

The defendant may show that the goods did in fact arrive safe; but whether he must prove a delivery at the residence of the plaintiff seems to depend on the circumstances of each particular case. It appears that, in the absence of any express contract or usage, carriers are bound to deliver the goods at the house of the consignee. *Hyde v. Trent and Mersey Navigation Co.*, 5 T. R. 389; *Storr v. Crowley*, 1 M. & C. 129; *Duff v. Budd*, 3 B. & B. 182. And if it be the carrier's course of trade to deliver goods at the consignee's residence, he is clearly bound to do so. *Golden v. Manning*, 2 W. Bl. 916. Where goods are conveyed by sea, it seems to be sufficient for the captain to deposit them in some place of safety and give notice to the consignee. *Hyde v. Trent and Mersey Navigation Co.*, 5 T. R. 398. And he is bound to keep them a reasonable time until fetched, and is liable during that time. *Galliffe v. Bourne*, 4 New Ca. 314.; affirmed on error, 3 M. & G. 643. If the carrier deliver the goods to a wrong person he is liable in trover. *Ross v. Johnson*, 5 Burr. 2825.; *Stephenson v. Hart*, 4 Bing. 476.

Proof of notice restricting liability.] The following cases were decided without reference to the Carriers' Act, 1 W. 4. c. 68., since which carriers by land are unable to avail themselves of a general public notice restricting their liability; see *post*, p. 363. Other carriers are still at liberty to do so. See *Wyld v. Pickford*, 8 M. & W. 443.

In order to affect the plaintiff with such notice, the defendant may shew that it was affixed in a conspicuous situation in the office to which the goods were brought by the plaintiff or his servant; *Leeson v. Holl*, 1 Stark. 186.; and this is enough, provided the servant can read; *Davis v. Willan*, 2 Stark. 279.; and did, in fact, read the notice. *Kerr v. Willan*, 2 Stark. 53.; and see *Brooke v. Pickwick*, 4 Bing. 222. So the notice may be conveyed by handbills or advertisements in newspapers; but a carrier, who circulates handbills wherein he refuses to be accountable for parcels beyond a certain value, must be taken to have expressed in such handbills all the terms of the special contract whereon he receives goods, and cannot further restrict his liability by a board in his office. *Cobden v. Bolton*, 2 Camp. 108. And where

two notices have been given, the carrier is bound by that which is least beneficial to himself. *Munn v. Baker*, 2 Stark. 255. A notice stuck up at the carrier's office is not sufficient to discharge him from his common law liability, where the goods have been delivered to his carter, and not at the office. *Clayton v. Hunt*, 3 Camp. 27. The notice in the office ought to be in such large characters that no person delivering goods there can fail to read it without gross negligence. *Per cur*, *ibid*. And therefore where a handbill on the office door stated in large characters the advantages belonging to the waggon, and in very small characters at the bottom the restrictive notice, Lord Ellenborough held it not enough to limit the defendant's liability. *Butler v. Heane*, 2 Camp. 415.

In order to prove that the plaintiff was acquainted with the notice, it has been customary to shew that he was in the habit of reading the newspaper in which it was inserted. *Leeson v. Holt*, 1 Stark. 186. But it is not sufficient to prove that the notice was inserted in a paper which circulates in the place in which the party lives; some proof must be given that he took in the newspaper in question. *Norwich Navigation Co. v. Theobald, M. & M.* 153.; and see *Boydell v. Drummond*, 11 East, 144 (n). Where the advertisement had been inserted in the Gazette, but there was no proof that the plaintiff read the Gazette, Lord Ellenborough, in *Leeson v. Holt* (*supra*), received the evidence. But in a subsequent case he was of opinion that this evidence could not be received without proof of the plaintiff's having read the Gazette; since he might be expected to look into the Gazette for notices of dissolution of partnership, but not for notices by carriers. *Munn v. Baker*, 2 Stark. 255. In a later case, where it was proved that the plaintiff had taken in, for three years, a weekly newspaper, in which the defendant's restrictive notice had been always advertised, and the jury, notwithstanding, found a verdict for the plaintiff, the court of Common Pleas thought the verdict right, and that it could not be intended that a party read all the contents of any newspaper he might chance to take in. They said that carriers who wished, by means of notice, to divest themselves of a common law responsibility, were bound to fix upon their employers a knowledge of such notice, and that they might easily do so by delivering to every person, who brought a parcel for conveyance, a printed paper containing the notice; and a new trial was refused. *Rowley v. Horne*, 3 Bing. 2. The defendant may bring home the notice to the plaintiff by shewing that, when *other* parcels were delivered to him, a ticket was also delivered containing the notice. *Mayhew v. Eames*, 3 B. & C. 603. To prove the contents of a notice painted on a board inlaid in the wall, an examined copy is sufficient. *Cobden v. Bolton*, 2 Camp. 108.

It does not destroy the operation of a notice restraining the liability of the defendants to *M.*, that the goods were known to the carrier to be of greater value, and that the additional rate of carriage was not demanded by him; *Marsh v. Horne*, 5 B. & C. 322.; *Levi v. Waterhouse*, 1 Price, 280.; nor that, on occasion of other losses, the carrier made allowances to the plaintiff for damage without inquiring into the cause of such damage. *Evans v. Soule*, 2 M. & S. 1. But the notice will be inoperative in case the carrier has been guilty of negligence. *Garnett v. Willan*, 5 B. & A. 53.; *Sleat v. Fagg*, 5 B. & A. 342.; *Duff v. Budd*, 3 B. & B. 177. He is bound, at all events, to take ordinary care,

and is liable not only for wilful neglect, but also for inadvertent misdelivery, if the mistake might have been avoided by ordinary care. *Wyld v. Pickford*, 8 M. & W. 443. But the plaintiff will not be allowed to complain of any negligent performance of the contract by the carrier, where that negligence has been occasioned by the plaintiff's own act; as by his treating the parcel as a thing of no value. *Per* Abbott C. J., *Sleat v. Fagg*, 5 B. & A. 347.; *Batson v. Donovan*, 4 B. & A. 21. Thus where the plaintiff sent a parcel of value by the defendant's coach, using an artifice to disguise the value (200 sovereigns inclosed in 6lbs. of tea), and the parcel was stolen by the defendant's servants, it was held that the plaintiff could not recover. *Bradley v. Waterhouse*, M. & M. 154. A railway company, who choose to be also carriers, are subject to the usual common law liabilities, which they may also restrain by a special contract. *Palmer v. Grand Junction Railway Co.*, 4 M. & W. 749. And the usual clauses in railway acts requiring previous notices of action do not apply to actions against them as carriers. *S. C. Ibid.*

The Carriers' Act, 1 W. 4. c. 68.] Great alterations have been introduced with regard to the responsibility of land carriers by the 1 W. 4. c. 68. After reciting the practice of sending by public mails, &c. parcels containing articles of great value in a small compass, and the heavy losses sustained by carriers thereby, the act provides as follows:—

By sect. 1. no common carrier by land for hire shall be liable for the loss of or injury to any articles of the descriptions following; (that is to say,) gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the governor and company of the banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money English or foreign, stamps, maps, writings, title deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them, contained in any parcel or package which shall have been delivered either to be carried for hire or to accompany the person of any passenger in any mail or stage-coach or other public conveyance, when the value of such articles contained in such parcel or package shall exceed 10*l.*, unless at the time of the delivery thereof at the office, warehouse, or receiving house of such common carrier, or to his bookkeeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger, the value and nature of such articles shall have been declared by the person sending or delivering the same, and the increased charge hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.

Sect. 2. authorizes the demand of an increased rate of charge for such articles, notified by a notice publicly affixed in the carrier's office, which all persons sending parcels are to be bound by without further proof of knowledge.

By sect. 4. no public notice or declaration heretofore made, or hereafter to be made, shall be deemed or construed to limit or in any-

wise affect, the liability at common law of any such public common carriers as aforesaid for or in respect of any articles or goods to be carried and conveyed by them; but all such common carriers shall be liable, as at the common law, to answer for the loss of or injury to any articles and goods in respect whereof they may not be entitled to the benefit of the act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding.

By sect. 5. every office, warehouse, or receiving house, used or appointed by such common carrier for receiving parcels, shall be taken to be the receiving house or office of such carrier; and any one or more coach proprietors or carriers may be sued without joining their co-proprietors.

By sect. 6. nothing in the act shall be construed to annul or affect any special contract between such common carrier and any other parties for the conveyance of goods and merchandises.

By sect. 8. nothing in the act shall be deemed to protect any common carrier from liability to answer for loss or injury to any goods whatsoever arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, book-keeper or other servant, from liability for any loss or injury occasioned by his or their own personal neglect or misconduct. [See observations in the judgment in *Hinton v. Dibbin*, 2 Q. B. 646.]

By sect. 9. common carriers shall be liable to pay only the actual value, as proved, not exceeding the declared value, together with the increased charges paid by the owner.

Upon the construction of the above act it has been held that it extends to all the articles enumerated in the 1st section, although not, within the words of the preamble, "an article of great value in small compass." To entitle a party to recover for loss or injury to any article of such a description, he must give express notice to the carrier of the value and nature of the article. A looking-glass, exceeding the value of 10*l.*, was packed up in a case and sent to the carrier's office to be conveyed from London to a house near Lymington. A notice was fixed up in the office, pursuant to the second section of the statute. The words "looking-glass," "keep this edge upwards," were written on the case, but no declaration was made of the nature and value of the article, and no increased rate of carriage paid. The parcel was conveyed from Lymington to its destination on a truck, that being the usual mode in which parcels were conveyed in that part of the country. When the glass was unpacked it was found to be broken. Held, that the carrier was not liable for the damage. *Owen v. Burnett*, 2 C. & M. 353., S. C. 4 Tyr. 133. The opinion of the carrier as to its real value will not supersede the necessity of a formal declaration of it. *Boys v. Pink*, 8 C. & P. 361.

Plaintiff sent a parcel, directed to a person in London, to the postmaster of Bradford to be forwarded to Melksham. The postmaster received 2*d.* to book the parcel, and sent it to an inn at Melksham. The innkeeper at Melksham booked the parcel for London, charging 2*d.* as "booking" for his trouble, and also charging the demand for carriage from Bradford, which he had paid. He forwarded the parcel to London by a mail-coach, of which the defendants were proprietors, and

which used to stop and take parcels at the inn, but did not change horses there. The innkeeper had no express authority from the defendants to take in parcels, and used his discretion in sending them by mail or any other coach. He kept no regular booking office. Held, 1st, that, for the purpose of taking in the above parcel, the inn was a receiving house of the defendants within 1 W. 4. c. 68. s. 5.; and, 2dly, that the plaintiff might properly sue the defendants on a contract with him to carry from Melksham to London. In the same case the defendants pleaded the general issue, and also that the parcel contained property within the description in 1 W. 4. c. 68. s. 1. above the value of 10*l*., that it was not delivered at a receiving house of the defendants, but to their servant, and that plaintiff did not, at the time of delivering the same to such servant, declare the value of the parcel, nor did he ever pay any increased rate of charge for it. To the latter plea the plaintiff replied generally *de injuria*. The jury found that the house was a receiving house of the defendants, and it appeared that the plaintiff had not declared the value of the goods. Held, that the plaintiff was entitled to a verdict on the second plea, and that the defendants could not treat the plea as one relying only on the non-declaration of value, and reject the rest of it; and that such defence could not be shewn under the general issue. *Syms v. Chaplin*, 5 A. & E. 634.

Since this act, if articles mentioned in sect. 1. are sent without declaration of value and payment of the increased charge, carriers are not liable, though the loss be occasioned by the gross negligence of their servants. *Hinton v. Dibbin*, 2 Q. B. 646. And it seems that there is no distinction between the negligence of themselves or their servants; but *wilful* misfeasance would come under a different consideration. See the argument in that case.

Where the carrier gives notice to the customer that he will not be answerable without payment of a higher charge, and the latter delivers the parcel without payment, this amounts to a special contract to carry on the terms of the notice, within sect. 6. *Semb.*, *Wyld v. Pickford*, 8 M. & W. 443.

CASE FOR DECEIT.

The causes of action under this head are various. The cases which most commonly occur in practice (besides that of warranty, which has been treated of under the head of *assumpsit*) are misrepresentation of solvency or character, and misrepresentation of the value of property. In the case of warranty, Not Guilty puts in issue the warranty and unsoundness, but not the sale. *Spencer v. Dawson*, 1 M. & Rob. 552.

Misrepresentation of solvency, &c.] An action lies for making a false and fraudulent representation of the character or solvency of another, whereby the plaintiff has been induced to give credit to him and has thereby suffered loss. *Pasley v. Freeman*, 3 T. R. 51.; *Pontifex v. Bignold*, 3 M. & G. 63. The fraud, as well as falsehood, must be proved; (and, as it seems, on the general issue); therefore where the repre-

sensation was made *bonâ fide* under a belief of its truth, the plaintiff cannot recover. *Shrewsbury v. Blount*, 2 M. & G. 475. In order to show *bona fides*, the defendants or any of them may prove representations made to them by third persons, or by co-defendants, of the truth of the alleged misstatements, whereby they were themselves misled. *S. C. Ibid.*

By stat. 9 G. 4. c. 14. s. 6. no action lies to charge a person upon or by reason of any representation or assurance made or given relating to the character, conduct, ability, trade, or dealings of any other person, to the intent that such other person may obtain credit, money, or goods [there] upon, unless such representation, &c. be made in writing, signed by the party to be charged therewith.

The defence of the want of a writing, though often pleaded, is open on the general issue. See *Lyde v. Barnard*, 1 M. & W. 101.

If, instead of suing for the fraudulent misrepresentation, the plaintiff sues for money had and received by reason of it, he cannot prove it unless it be in writing. *Haslock v. Fergusson*, 7 A. & E. 86. Where defendant stated that the plaintiff might safely trust A. B., because the defendant had the title deeds of an estate of A. B., this was held to be within 9 G. 4. c. 14. s. 6. *Swann v. Phillips*, 8 A. & E. 457. A representation made respecting the credit of a firm, of which the defendant is a partner, is within the act; such firm being "another person" within it. *Devaux v. Steinkeller*, 6 New Ca. 84. In *Lyde v. Barnard*, 1 M. & W. 101., the court were divided on the point whether a representation, that the life estate of A. B. was charged with only three annuities, was a representation relating to the credit and ability of A. B. within the act.

Misrepresentation of the value of property.] Where the vendor of a public-house misrepresented the amount of business done in it, whereby the plaintiff was induced to buy the lease, an action was held to lie, although such statement was not contained in the conveyance or memorandum of the bargain. *Dobell v. Stevens*, 3 B. & C. 623. So where the misstatement had been made to another person, who communicated it (with the defendant's knowledge) to the plaintiff. *Pilmore v. Hood*, 5 New Ca. 97. An untrue representation, not embodied in the contract, will not affect its validity, unless it be also fraudulent. *Cornfoot v. Fowke*, 6 M. & W. 358. But where an agent for the sale of defendant's house erroneously described it as rented at 100*l.* free from rates, and the plaintiff bought it on the faith of such statement, the defendant knowing it to be untrue, it was held that case lay for the deceit, though defendant had not instructed the agent to make the statement. *Fuller v. Wilson*, 3 Q. B. 58. The judgment, on a special verdict, in this case was reversed; but on the ground that the verdict did not shew any fraudulent representation either by the defendant or his agent. It was however held, that if the defendant's agent had been guilty of a fraudulent misstatement the defendant would have been liable for it. See *Wilson v. Fuller*, *Ib.* 68. From the judgment in this case, and in that of *Evans v. Collins*, cited 3 Q. B. 78. (π.), it should seem that a mere misstatement, made voluntarily by one who ought not to make any which he does not know to be true, may be a ground of action by a party who is misled by it, though the defendant was not aware of the falsehood of it; and that it is, therefore, not necessary to prove an averment of a *scienter* in such case. See also *Taylor v. Ashton*, 11 M. & W. 401.

CASE FOR DEFAMATION.

In an action on the case for slander or libel, the usual heads of evidence are, the speaking of the words or the publication of the libel, the innuendos, the introductory averments, the malice of the defendant in certain cases, and the damage sustained.

Proof of the speaking the words.] Though the plaintiff need not prove the speaking of all the words laid in the declaration, yet it is necessary to prove some material part of them, and it is not sufficient to prove merely equivalent words. *Per* Lawrence J., *Maitland v. Goldney*, 2 East, 434. Thus a statement of words spoken affirmatively is not supported by proof of words spoken by way of interrogation. *Barnes v. Holloway*, 8 T. R. 150.; *B. N. P.* 5. Where the declaration avers that the defendant spoke certain words, it must be taken to mean that he used them as his own words; and if he repeated them as the words of another, it is a variance. *M'Pherson v. Daniels*, 10 B. & C. 274.; *Bell v. Byrne*, 13 East, 554. Where the words laid were, "This is my umbrella, and he stole it from my back door," and the words proved, "It is my umbrella," &c., it was held a variance; the word *this* importing that the umbrella was present (which in fact it was not). *Walters v. Mace*, 2 B. & A. 756. Where all the words constitute one charge, they must all be proved. Thus where the words laid were, "He is selling coals at one shilling a hushel to pocket the money, and become a bankrupt to cheat his creditors;" and the words "and become a bankrupt" were not proved, Eyre C. J. held that the words constituted one general charge, and that the variance was fatal. *Flower v. Pedley*, 2 Esp. 491. Where the words laid were, "S. (the plaintiff) is to be tried at the Old Bailey for," &c., and the proof was of the words, "I have heard that S. is to be tried," &c., this was held a variance, but amendable at Nisi Prius, or by special indorsement under sect. 24. of 3 & 4 W. 4. c. 42. *Smith v. Knowelden*, 2 M. & G. 561. "I cannot answer for the cleanliness of her person, because she takes snuff;" the words being "I cannot answer," &c., "because I believe she takes snuff," was held a variance. *Cook v. Stokes*, 1 M. & Rob. 237. An allegation that the defendant said of the plaintiff, "she secreted 1s. 6d. under the till, stating these are not times to be robbed," was held to import that the plaintiff, when secreting the 1s. 6d., had used the latter words, and that therefore the allegation did not contain that which was actionable *per se*, so as to disentitle the plaintiff to full costs where the verdict was under 40s. *Kelly v. Partington*, 5 B. & Ad. 645. But where the words omitted to be proved do not qualify or affect those proved, the omission is immaterial. Thus, where the words stated were "Ware Hawk; you must take care of yourself there; mind what you are about:" and the plaintiff failed to prove the words "Mind what you are about;" the variance was held immaterial. *Orpwood v. Barker*, 4 Bing. 261. See also *Rutherford v. Evans*, 6 Bing. 451. Words laid as spoken in English are not proved by evidence of words spoken-

in a foreign language. *Zenobio v. Artell*, 6 T. R. 162. As to the power of amendment in such cases, see *antè*, p. 67.

Proof of the libel.] A mere omission in setting out part of a libel is not fatal, unless the sense of that which is set out is thereby varied. *Tabart v. Tipper*, 1 Camp. 353. But where a libellous paragraph contained two references, by which the words appeared to be in fact the language of a third person speaking of the plaintiff's conduct, and those references were omitted in the declaration, it was held that the omission altered the sense of the passage, and that the variance was fatal. *Cartwright v. Wright*, 5 B. & A. 615. See *R. v. Solomon*, R. & M. 253. And where the words laid were "My sarcastic friend, by leaving out the repetition," &c., and those proved were, "my sarcastic friend ΜΩΡΟΣ, by leaving out," &c., Lord Ellenborough held the variance fatal. *Tabart v. Tipper*, 1 Camp. 353. So where the libel on the record imputed to the plaintiff, an engineer, "mismanagement or ignorance," and the words proved were, "ignorance or inattention," this was held a fatal variance. *Brooks v. Blanshard*, 1 C. & M. 779; S. C. 3 Tyr. 844. If the omission or addition of a letter does not change the word so as to make it another word, the variance is not material. *Per* Lord Mansfield, *Beech's case*, 1 Leach, 159., 3rd ed. Thus, "undertood," for "understood," is no variance. *Ibid*.

Whether a writing is a libel or not is a question for the jury, and the judge is not bound to give any opinion on it; *Baylis v. Lawrence*, 11 A. & E. 920.; but the proper course is said to be for the judge to define what a libel is in point of law. *Parniter v. Coupland*, 6 M. & W. 105. And it may be defined to be a publication without justification or lawful excuse, calculated to injure the reputation of another by exposing him to hatred, contempt, or ridicule. *Per* Parke B., *ib*. A writing may be a libel on a private person, which would not be so on a person in a public character or office; for the acts of public men, which concern the subject, may be lawfully commented upon without malice; but to impute bad or corrupt motives is a libel in either case. *Per curiam*, S. C. *Ib*.

Proof of publication of libel.] Proof that the libel produced is in the defendant's handwriting is said to be presumptive evidence of publication, so as to throw the proof of non-publication upon him. *R. v. Beare*, 1 Ld. Raym. 417.; *Lamb's case*, 9 Rep. 59., b. But see the arguments in *R. v. Burdett*, 3 B. & A. 717.; and 4. B. & A. 95. So printing a libel, unless qualified by circumstances, is said *primè facie* to be a publishing; for it must be delivered to the compositor, and the other subordinate workmen. *Baldwin v. Elphinstone*, 2 W. Bl. 1038. But this proposition is denied in *Watts v. Fraser*, 7 A. & E. 223. A libel may be published in a letter to a third person; but the publication of a libellous letter to the plaintiff himself, though it may be the subject of an indictment, is not such a publication as to maintain an action. *Phillips v. Jansen*, 2 Esp. 624. Where however the libel was contained in a letter sent by the defendant to the plaintiff, proof that the defendant knew that the plaintiff's letters were usually opened by his clerk, is evidence of a publication. *Delacroix v. Thevenot*, 2 Stark. 63. A letter, containing a libel, was proved to be in the handwriting of the defendant; to have been addressed to a party in Scotland; to have

been received at an intermediate post-office on its passage to Scotland to be forwarded thither; and it was produced at the trial with the proper post marks, and with the seal broken: this was held sufficient evidence of a publication to the person to whom it was addressed. *Warren v. Warren*, 1 C. M. & R. 250. Shewing a copy of a libellous caricature to another, at his request, has been held not sufficient evidence of publication to support an action. *Smith v. Wood*, 3 Camp. 323. The delivery of a libellous pamphlet by the governor of a colony to his attorney-general, not for any official purpose, is a publication. *Wyatt v. Gore, Holt*, N. P. C. 299. The sale of a libel in the defendant's shop by his servant or agent there for the defendant's benefit, is a publication by the defendant, though he was not privy to the contents or sale. *Com. Dig. Libel* (B. 1). The delivery of a newspaper to the officer at the stamp-office is a sufficient publication to sustain an indictment. *R. v. Amphitt*, 4 B. & C. 35. Proof that the defendant accounted with the officer of stamps for the duty on advertisements in the paper in question is evidence of publication. *Cook v. Ward*, 6 Bing. 409. Evidence that the libel was written by the defendant's daughter, who was authorised to make out his bills and write his general letters of business, is not sufficient to charge the defendant; unless it can be shewn that such libel was written with the knowledge or by the procurement of the defendant. *Harding v. Greening*, 1 B. Moore, 477. In order to shew that the defendant had caused a libel to be inserted in a newspaper, a reporter to the paper was called, who proved that he had given a written statement to the editor of the newspaper, the contents of which had been communicated by the defendant for the purpose of such publication; and that the newspaper produced was exactly the same, with the exception of one or two slight alterations not affecting the sense; it was held that what the reporter published might be considered as published by the defendant, but that the newspaper could not be read in evidence, without producing the written statement delivered by the witness to the editor. *Adams v. Kelly*, R. & M. 157. A paper in the defendant's handwriting found in the house of the editor of the newspaper in which the libel appeared is evidence against the defendant, though partially erased, and altered (in immaterial parts) in the printed paper. *Tarpley v. Blabey*, 2 New Ca. 437. Where A. and B. are sued jointly for a libel, and A. lets judgment go by default, *quære*, whether the plaintiff must prove a *joint* publication in order to get a verdict against B.? See *Johnson v. Hudson*, 7 A. & E. 233. Where a letter (whether sealed or not there was no direct proof) was put into the post-office in the county of L., it was held by the court of K. B. (Bayley J., *dub.*) that it was a publication in L. *R. v. Burdett*, 4 B. & A. 95.; *R. v. Watson*, 1 Camp. 215. When a libel has been printed by the defendant's order, and he has taken away some of the impressions, one of those left with the printer may be read in evidence against him. *R. v. Watson*, 2 Stark. 129. The sale of each copy of a printed libel is a distinct publication. *R. v. Carlisle*, 1 Chitty's Rep. 451.

The publication of the libel may likewise be proved by the admission of the defendant. Where the defendant admitted that he was the author of a printed libel, "errors of the press and some small variance only excepted," Pratt C. J. received this as evidence of publication, and put it to the defendant to prove material variances. *Rex v. Hall*, 1 Stra. 416.

Proof of publication in newspapers.] The proof of the publication of libels contained in newspapers is greatly facilitated by the statute 6 & 7 W. 4. c. 76. (repealing and re-enacting similar provisions in 38 G. 3. c. 78.). The following is an abstract of its provisions :—By sect. 6. declarations are to be delivered to the commissioners of stamps or other proper officer, specifying the names, additions, and abode of the printers, publishers, and two at least of the proprietors, with the proportional shares of the latter, and describing the printing-house, house of publication, and title of the paper. By sect 8. all such declarations shall be filed and kept in such manner as the commissioners of stamps shall direct ; and copies thereof, certified to be true copies, shall be admitted in all proceedings civil and criminal, and upon every occasion whatsoever touching any newspaper mentioned in such declaration, or touching publication matter or thing contained in any such newspaper, as *conclusive* evidence of the truth of all matters set forth in such declaration as are hereby required to be therein set forth, and of their continuance respectively in the same condition down to the time in question against every person who shall have signed such declaration, unless it shall be proved that previous to such time such person became lunatic, or that previous to the publication in question on such trial such person did duly sign and make a declaration that such person had ceased to be a printer, publisher, or proprietor of such newspaper, and did duly deliver the same to the said commissioners, or to such officers as aforesaid, or unless it shall be proved that previous to such occasion a new declaration of the same nature was duly signed and made and delivered respecting the same newspaper, in which the person sought to be affected on such trial did not join ; and the said commissioners, or the proper officer by whom any such declaration shall be kept, shall, upon application in writing made to them or him respectively by any person requiring a copy certified according to this act, in order that the same may be produced in any civil or criminal proceedings, deliver such certified copy to the person applying for the same upon payment of the sum of one shilling and no more ; and in all proceedings, and upon all occasions, a copy of any such declaration certified to be a true copy under the hand of one of the said commissioners, or of any officer in whose possession the same shall be, upon proof made that such certificate hath been signed with the handwriting of a person described in or by such certificate as such commissioner or officer, and whom it shall not be necessary to prove to be a commissioner or officer, shall be received in evidence against any and every person named in such declaration as a person making or signing the same, as sufficient proof of such declaration, and that the same was duly signed and made according to this act, and of the contents thereof ; and every such copy so produced and certified shall have the same effect for the purposes of evidence against any and every such person named therein to all intents whatsoever as if the original declaration, of which the copy so produced and certified shall purport to be a copy, had been produced in evidence and been proved to have been duly signed &c. by the person appearing to have signed the same ; and whenever a certified copy of any such declaration shall have been produced in evidence against any person who signed it, and a newspaper shall afterwards be produced in evidence entitled in the same manner as the newspaper mentioned in such declaration, and wherein the name of the printer and publisher, and the place of printing, shall be the same as the name of the printer

and publisher, and the place of printing mentioned in such declaration, or shall purport to be the same, whether such title, name, and place, printed upon such newspaper shall be set forth in the same form of words as is contained in the said declaration, or in any form of words varying therefrom, it shall not be necessary for the plaintiff, &c., in any action, &c., to prove that the newspaper to which such action or other proceeding may relate was purchased of the defendant, or at any house, shop, or office belonging to or occupied by the defendant, or by his servants, &c. By sect. 13. a copy of every paper, signed by the printer or publisher, with his name and abode, is to be delivered to the commissioners of stamps, or their officer in that behalf, within a certain time after the day of publication; and such commissioners, &c. shall, on application, produce the signed copy in evidence in any civil or criminal proceeding, or deliver it for that purpose to the party applying, upon security given to return it; and "all copies so delivered shall be evidence against every printer, publisher, and proprietor of every such newspaper respectively, in all proceedings, civil or criminal, to be commenced and carried on, as well touching such newspaper as any matter or thing therein contained, and touching any other newspaper and any matter or thing therein contained, which shall be of the same title, purport, or effect with such copy so delivered as aforesaid, although such copy may vary in some instances or particulars either as to title, purport, or effect; and every printer, publisher, and proprietor of any copy so delivered shall to all intents and purposes be deemed to be the printer, publisher, and proprietor respectively of all newspapers which shall be of the same title or effect with such copies or impressions so delivered, notwithstanding such variance, unless such printer, publisher, or proprietor respectively shall prove that such newspapers were not printed or published by him, nor by, nor with, his knowledge or privity."

Since this statute the production and proof of a certified copy of the affidavit, and of a newspaper corresponding in the title and in the names and descriptions of printer and publisher, with the newspaper mentioned in the affidavit, will be sufficient evidence of publication. *Mayne v. Fletcher*, 9 B. & C. 382.; *R. v. Hunt*, 31 State Trials, 375., decided on 38 G. 3. c. 78. But where the affidavit and the newspaper varied in the place of residence of the party it was held insufficient. *Murray v. Souter*, cited 6 Bing. 414. See *R. v. Franceys*, 2 A. & E. 49. Where the defendant wishes to prove in mitigation other libels published against him by the plaintiff, he ought not to rely upon the means of proof given by the above act. See *Watts v. Fraser*, 7 A. & E. 223.

Proof of introductory averment, &c.] All the introductory averments essential to the plaintiff's case must be proved, when specially denied upon the pleadings; but if immaterial to the character of the libel itself, the finding on it will be immaterial. Where the declaration stated, by way of inducement, that the plaintiff, an attorney, had been employed as vestry clerk to the parish of A.; that, whilst he was such vestry clerk, certain prosecutions were carried on against B., and, to bring the same to a successful issue, certain sums belonging to the parishioners were appropriated to the discharge of the expenses of the said proceedings, yet defendant intending to injure the plaintiff in his profession and in his office of vestry clerk, and to cause it to be suspected

that he had fraudulently misapplied the money, falsely and maliciously published a libel of and concerning the matters aforesaid, &c.; and it appeared, on the production of the libel at the trial, that the imputation was that the plaintiff had applied the parish money in payment of the expenses of the prosecution *after it had terminated*; it was held that this was no variance, because it did not alter the character of the libel; the fraud imputed to the plaintiff being the same, whether the money was misapplied before or after the proceedings had terminated. *May v. Brown*, 3 B. & C. 113.; and *per Abbott C.J.*, *ibid.* "The allegation does not compel the plaintiff to prove, formally and precisely, that the libel relates to every part of the matter so previously stated; but it satisfies all he has taken upon himself to prove, if he shews that the libel relates substantially to the matters alleged by way of introduction in such manner as that the defamation contained in the libel is of the character and effect which the plaintiff has described." So where the declaration stated that the plaintiff was an attorney, and that the defendant, intending to injure him in his said profession, published the libel of and concerning the plaintiff and of and concerning him in his said profession, and the plaintiff failed in proving that, at the time of the publication of the libel, he was an attorney, it was held that this was not a fatal variance, the words of the libel being actionable without reference to his professional character. *Lewis v. Walter*, 3 B. & B. 138 (n); *Cox v. Thomason*, 2 C. & J. 361. So where the words themselves convey an imputation of an offence, as, "he is a thief, and has robbed me of my bricks," no introductory averment is necessary. *Slowman v. Dutton*, 10 Bing. 402.; *Curtis v. Curtis*, 10 Bing. 477.

Where the fact stated in the introductory averment, and connected with the libel by the words "of and concerning," is material to the defamatory character of the libel itself, it must be proved as stated. *Cox v. Thomason*, 2 C. & J. 361. *Teesdale v. Clement*, 1 Chitty's Rep. 603., and *per Cur.*, *ibid.* Since the new rules of pleading, such averments must be put in issue by a proper plea, otherwise they are admitted. See *Heming v. Power*, 10 M. & W. 564. But where the libel is said to be "of and concerning" some fact alleged in the inducement, then it may still be a question on Not guilty, 1st. Whether the words or libel were meant to refer to it? 2dly. Whether, supposing they did not refer to it, the fact itself was material or otherwise? If material, then it should seem that the connection must be proved; if immaterial, then it matters not whether the words or libel refer to it or not. Where the words were stated to be spoken of and concerning goods said to be "stolen" from B., and it appeared that they were spoken of goods said to be "taken" from B., the variance was held fatal. *Shepherd v. Bliss*, 2 Stark. 510. Where the declaration stated that the plaintiff was treasurer and collector of certain tolls, and that the defendant spoke of the plaintiff, as such treasurer and collector, certain words, "meaning that the plaintiff, as such treasurer and collector, had been guilty, &c.;" and the plaintiff failed to prove that he was collector, it was held (on Not guilty, before the new rules) that the plaintiff was bound to prove that he was both treasurer and collector; *Sellers v. Tull*, 4 B. & C. 655; and *per Cur.*, "It appears that there is an innuendo expressly applying the words to the plaintiff in his character of collector, which makes the case very distinguishable from those which have been cited (*May v. Brown*, *Lewis v. Walter*, *supra*), for in them the meaning of the words was not limited by the insertion of such an

innuendo." See *Heriot v. Stuart*, 1 *Esp.* 437.; and *semb.* in *Sellers v. Till*, the charge was against the plaintiff as collector.

Where the words are alleged to have been spoken of and concerning the plaintiff in a particular character, and are only actionable as having been spoken of the plaintiff in that character, such character must (if put in issue by the plea) be proved. But where the words themselves admit the plaintiff's character, evidence of it is unnecessary. *Yrisarri v. Clement*, 3 *Bing.* 432. And where the character is that of a public officer, as assistant overseer, &c., his acting as such is sufficient evidence. *Cannell v. Curtis*, 2 *New Ca.* 228.

Whether the words were spoken of the plaintiff in a particular character is for the jury; *Jones v. Littler*, 7 *M. & W.* 423.; and if the words are such as must be injurious to the plaintiff as a trader (*e.g.* words imputing insolvency), it is then needless to prove them spoken of him as such, *S. C. ibid.* The declaration stated that the plaintiff had been a woolstapler at C., and a brewer at O., and that the defendant spoke of him, as such trader as aforesaid, the following words: "Mr. H. (the plaintiff) has been a bankrupt at C., &c." One count alleged the words to have been spoken of the plaintiff in his trade of a brewer. There was no evidence of the plaintiff having been a woolstapler, but it was proved he had been a brewer at O.; the court held it no variance; for the place where the bankrupt became bankrupt was immaterial; he might have become a bankrupt, whilst a brewer at O., by an act of bankruptcy committed at C. *Hall v. Smith*, 1 *M. & S.* 287. So where the declaration alleged the plaintiff to be a carpenter and sworn appraiser; and that the defendant, intending to injure him in his several trades, in a discourse of and concerning the plaintiff in his trade of a carpenter, spoke the words, &c.; it was held unnecessary to prove that the plaintiff carried on the trade of a sworn appraiser. *Figgins v. Cogswell*, 3 *M. & S.* 369. See also *Rutherford v. Evans*, 6 *Bing.* 451.

To prove that the plaintiff is a physician (where that character is denied or not impliedly admitted by the libel) it is not sufficient to produce a diploma under the seal of one of the Universities, without proving the seal. *Moises v. Thornton*, 8 *T. R.* 303. To make such an instrument evidence it should be either the original act of the corporation conferring the degree, or an examined copy of it. If an original act, it should be proved that the seal affixed to it is the seal of the University; if considered as a copy, it should be compared with the original book by the witness who produces it. *Per Grose J., ibid.* To prove a degree of Doctor of Medicine in the University of St. Andrews, a sealed instrument and a written paper were produced; the former purporting to be a diploma of Doctor of Medicine. It was proved that a person at St. Andrews, calling himself the University Librarian, had shewn, as the University seal in the University Library, a seal corresponding with that on the instrument produced. The written paper purported to be an act of the University conferring the degree. In the same room, the same person, with others calling themselves professors, had shewn, as the book of acts of the University, a book containing an entry agreeing with the written paper. This was held to be a sufficient proof of the diploma. *Collins v. Carnegie*, 1 *A. & E.* 695. An averment that the plaintiff practised as a physician in England, is not supported by evidence that he practised under a Scotch diploma, without a licence from the College of Physicians; for such practice is illegal; nor is it enough

(where the libel charges the plaintiff with being no physician) to shew that the plaintiff did, in fact, practise as a physician. *S. C. ibid.* The books of a University, conferring the degree of Doctor of Laws, are evidence to prove that fact. *Moses v. Thornton*, 8 T. R. 306.

In order to prove that the plaintiff is an attorney, an examined copy of the roll of attorneys, signed by the plaintiff, is sufficient. So the book from the master's office containing the names of all the attorneys, produced by the officer in whose custody it is kept, is good evidence, together with proof that the plaintiff practised as an attorney at the time of the words spoken. *R. v. Crossley*, 2 Esp. 526.; *Lewis v. Walter*, 3 B. & C. 138.; *Jones v. Stevens*, 11 Price, 251. And the stamp-office certificate, countersigned by the master of the court, is sufficient *prima facie* evidence of the party being an attorney of that court. *Sparling v. Haddon*, 9 Bing. 11.

Where the title to the particular situation is not the subject of any express documentary appointment, the acting in the situation is of course the only evidence which the fact admits of. 2 Stark. Ev. 860., 1st. ed. Where the plaintiff averred that he was employed by "The New England Company," and that the libel was published of him in such employment, it was held sufficient to prove that the company was commonly so called, though that was not its legal name. *Rutherford v. Evans*, 6 Bing. 451.

The allegation that the words were spoken in the presence and hearing of A. B., and others, is supported by proof that they were spoken in the presence of others only. *B. N. P.* 6.

Proof of innuendo.] The plaintiff must in general prove the innuendoes as laid. The whole of an innuendo, which is not on the face of the declaration a bad one, must be proved, where it gives a specific character to the libel or slander, and thereby becomes part of the issue. *Williams v. Stott*, 1 C. & M. 687.; *Harvey v. French*, 1 C. & M. 11.; *Roberts v. Camden*, 9 East, 93. Thus where the words, in fact, imputed either a fraud or a felony; but by the innuendo were confined to the latter; Lord Ellenborough ruled that the plaintiff must prove that they were spoken in the latter sense. *Smith v. Carey*, 3 Camp. 461. So if the plaintiff, in stating a libel, connects it by innuendo with a particular allegation, he will be bound to prove a libel relating to the matter contained in that allegation. *Per Bayley J., May v. Brown*, 3 B. & C. 128.; *Sellers v. Tull*, 4 B. & C. 655. But where the innuendo does not refer to any precedent averment, but improperly introduces new matter not necessary to sustain the action, it need not be proved, but may be rejected as surplusage. *Roberts v. Camden*, 9 East, 93.; *Harvey v. French*, 1 C. & M. 11. So where the words spoken import in themselves a criminal charge, and the innuendo introduces matter which is merely useless, it may be rejected as surplusage. *Semb., Day v. Robinson*, 1 A. & E. 558.; *Williams v. Gardiner*, 1 M. & W. 245. Where there are several innuendoes, some of which are proved, and are sufficient to maintain the action, and others are not proved, the plaintiff may confine his verdict to those which are proved; and if he does not confine it, but has a general verdict, the defendant may nevertheless have his costs as to libellous matter connected with the negatived innuendoes. *Prudhomme v. Fraser*, 2 A. & E. 645. But the judge will not strike out the unproved innuendoes or the introductory matter

connected with them at Nisi Prius, though superfluous. *S. C.* 1 *M. & Rob.* 436.

The declarations of spectators, whilst viewing a libellous picture publicly exhibited, were admitted by Lord Ellenborough as evidence that the picture was intended to represent the parties libelled. *Du Bost v. Beresford*, 2 *Camp.* 512.

Proof of malice.] Where the publication is defamatory, the law infers malice, unless something can be drawn from the circumstances attending the publication to rebut that inference. *Per* Le Blanc J., *R. v. Creevey*, 1 *M. & S.* 282. In such cases, therefore, it is unnecessary for the plaintiff to adduce any evidence of malice. But in actions for such slander as is *prima facie* excusable on account of the cause of speaking or writing it, 'as in the case of servants' characters, or confidential advice, or communications to persons who ask it and have a right to expect it, malice in fact must be proved. *Per* Bayley J., *Bromage v. Prosser*, 4 *B. & C.* 256. And see *M'Pherson v. Daniels*, 10 *B. & C.* 272. In order to maintain an action against a master for giving a false character of a servant, circumstances of express malice must be proved. *Per* Lord Mansfield C. J., *Hargrave v. Le Breton*, 4 *Burr.* 2425. To prove such express malice, evidence that the character given was false, is admissible. *Rogers v. Clifton*, 3 *B. & P.* 587; *King v. Waring*, 5 *Esp.* 13; *Pattison v. Jones*, 8 *B. & C.* 578. But mere untruth is not evidence of malice, unless coupled with proof that the defendant knew it to be so; but if the defendant believed it to be true, it is a defence. *Fountain v. Boodle*, 3 *Q. B.* 5. Such express malice need not be proved by extrinsic evidence, but may be collected from the libel itself by the jury. *Wright v. Woodgate*, 2 *C. M. & R.* 573., *post*, p. 377., as to privileged communications.

Evidence of other words or libels.] In an action for libel or slander, evidence of other libels or words is sometimes given to shew the *animus* of the defendant: thus it may be proved that the defendant spoke the same words at different times; *Charlter v. Barret*, *Peake*, 22. So words spoken *after* those for which the action is brought, whether actionable or not, are admissible to shew *quo animo* the words which are the subject of the action were spoken. *Rustell v. Macquister*, 1 *Camp.* 49. (n); *Tate v. Humphrey*, 2 *Camp.* 73. (n); *Lee v. Huson*, *Peake*, 166. So in an action against the editor of a monthly periodical work, articles published from month to month, alluding to the action and attacking the plaintiff, are admissible to show *quo animo* the libel was published, and that it was published concerning the plaintiff. *Chubb v. Westley*, 6 *C. & P.* 436. But see *Mead v. Daubigny*, *Peake*, 125. But evidence of subsequent words of the same purport with the slander is not admissible, when the words declared on are unambiguous; *Pearce v. Ormsby*, 1 *M. & Rob.* 455.; *Symmons v. Blake*, *ib.* 477.; or where the libellous intention is not equivocal. *Stuart v. Lovell*, 2 *Stark.* 93. Previous slander, for which damages have been recovered, may be given in evidence. *S. C.* *ib.* And see *Defries v. Davis*, 7 *C. & P.* 112. So in an action for a libel published in a weekly paper, evidence was admitted that other papers of the same title had been *since* purchased at the defendant's shop, to shew that the papers, which purported to be weekly publications of public transactions, were sold deliberately in

the regular course of public circulation ; but Lord Ellenborough added, that he should direct the jury not to take it into consideration in damages. *Plunkett v. Cobbett*, 5 *Esp.* 136. ; accord. *Barwell v. Adkins*, 1 *M. & G.* 807. Evidence of other libels is not admissible, unless they directly refer to the libel set out in the declaration. *Finnerty v. Typper*, 2 *Camp.* 72.

Where other words than those laid in the declaration are thus given in evidence, the defendant may prove such words to be true, because he has no opportunity of justifying them. *Warne v. Chadwell*, 2 *Stark.* 457. But not where the words amount to a mere repetition of the slander in the declaration. *Per Parke J.*, in *Higgs v. Snell*, *Essex Sp. As.* 1827.

Evidence of plaintiff's good character.] The plaintiff will not be allowed to go into general evidence of his good character, either where the general issue alone is pleaded, or where there are pleas of justification on the record. *Stuart v. Lovell*, 2 *Stark.* 93. *Cornwall v. Richardson*, *R. & M.* 305. See *ante*, p. 55.

Proof of damage.] Where the words are actionable in themselves, or with reference to the plaintiff's trade, it is not necessary to give any evidence of damage ; *Tripp v. Thomas*, 3 *B. & C.* 427. ; *Ingram v. Lawson*, 6 *New Ca.* 212. But where special damage is the gist of the action, it must be proved as laid, or the plaintiff will be nonsuited. *B. N. P.* 6. In such cases the defendant will not be allowed, under a general allegation of damage, to give in evidence particular instances ; *B. N. P.* 7., 1 *Saund.* 243. *d. (n)*. But where the declaration, in an action for slander imputing incontinence to the plaintiff, stated that he was preacher to a dissenting congregation in a certain chapel, and derived considerable profit from his preaching ; and by reason of the slander, "the said persons frequenting his chapel" had refused to permit him to preach there, and had discontinued his salary, &c., it was held sufficient, without saying who those persons were. *Hartley v. Herring*, 8 *T. R.* 130. Where the declaration stated, that in consequence of the libel, the plaintiff lost the profits of certain performances at the theatre, it was held that a witness might be asked, "whether the receipts of the house had not diminished," but not "whether particular persons had not in consequence given up their boxes." *Ashley v. Harrison*, 1 *Esp.* 48. The persons particularized in the declaration as having left off dealing, &c. with the plaintiff, are the proper witnesses to prove that fact ; 1 *Saund.* 243. *d. (n)* ; and it cannot be proved from their declarations. *Tilk v. Parsons*, 2 *C. & P.* 201. And see 1 *Esp.* 50. An allegation, that by reason of the speaking of slanderous words by the defendant one D. refused to trust the plaintiff, is not proved by evidence that the defendant spoke the words to E., who voluntarily, and without the privity of the defendant, repeated them to D. *Ward v. Weeks*, 7 *Bing.* 211.

The special damage must be the legal and natural consequence of the words spoken, and not the mere wrongful act of a third person ; *Vicars v. Wilcocks*, 8 *East.*, 1. ; *Ward v. Weeks*, 7 *Bing.* 215. ; but this has been doubted ; *Green v. Bullon*, 2 *C. M. & R.* 713. 715. ; and seems at variance with *Newman v. Zachary Aley* 3., where it was held that if a stranger wrongfully disturbs the plaintiff's possession in consequence of the defendant's slander, an action lies against the defendant, though the stranger may also be sued.

It must not be too remote; thus where the defendant libelled a public performer, in consequence of which she refused to sing, and the party, who had engaged her to sing, brought an action on the case, Lord Kenyon was of opinion that the injury was too remote. *Ashley v. Harrison*, 1 *Esp.* 48. The loss of the substantial benefit arising from the hospitality of friends is sufficient special damage. *Moore v. Meagher*, 1 *Taunt.* 39. Where, in consequence of defamatory words spoken by the defendant, the person, to whom they were spoken, turns the plaintiff out of his service, the defendant is liable, though the words were not believed to be true by the person to whom they were spoken. *Knight v. Gibbs*, 1 *A. & E.* 43.

Words are not actionable though special damage has ensued, unless they be in themselves disparaging. *Kelly v. Partington*, 5 *B. and Ad.* 645.

Defence.

By the rules H. T. 4 W. 4., in actions on the case, the plea of "Not guilty," shall operate as a denial only of the breach of duty, or wrongful act charged, and not of facts in the inducement. In an action of slander of a plaintiff in his office, profession or trade, the plea of Not guilty operates to the same extent precisely, as before the new rules, in denial of speaking the words, of speaking them maliciously and in the sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff holding the office, or being of the profession or trade alleged. All matters in confession and avowance are to be specially pleaded as in assumpsit.

Where the declaration alleged that the words "black sheep" were used by the defendant to mean bad characters, and then stated a libel calling the plaintiff a "black sheep," the meaning assigned to the words cannot be disproved by the defendant under Not guilty; for it is inducement. *McGregor v. Gregory*, 11 *M. & W.* 287.

Evidence to disprove the malice. Privileged statement.] The defence of a privileged communication may be given in evidence under the general issue; *Lillie v. Price*, 5 *A. & E.* 645.; and in *Stockdale v. Hansard*, 7 *C. & P.* 731., Littledale J. refused to let a plea of privilege be pleaded together with Not guilty, on the ground that the defence of privilege might be given in evidence under the general issue.

Where the words are *prima facie* actionable, but there are in fact circumstances attending the publication which rebut the legal inference of malice, evidence of such circumstances will be a good defence under the general issue; *Fairman v. Ives*, 5 *B. & A.* 644.; *Pattison v. Jones*, 8 *B. & C.* 578.; *as*, —

1. Where the words are spoken by a Member of Parliament in his place; but the privilege does not extend to a subsequent publication of them. *R. v. Creevey*, 1 *M. & S.* 273.

2. Where the words are spoken in the course of a legal proceeding, either by the party (*Ram. v. Lamley*, *Hutt*, 113.; *Weston v. Dobniet*, *Cro. Jac.* 432; *Astley v. Younge*, 2 *Burr.* 807.; *Johnson v. Evans*, 3 *Esp.* 32.) by a witness; (*Brodie's case*, cited *Palmer*, 144., *Harding v. Bulman*, 1 *Brownl.* 2.) by counsel; (*Brook v. Montague*, *Cro. Jac.* 90., *Hodgson*

v. Scarlett, 1 B. & A. 232.) or by a judge; (*Jekyll v. Sir J. Moore*, 2 New Rep. 341.) So words spoken *bonâ fide*, for the purpose of obtaining redress, or of forwarding the ends of justice, though not spoken in the course of a legal proceeding. *Lake v. King*, 1 Saund. 131.; *R. v. Baillie*, Bac. Ab. Libel, A. 2.; *R. v. Baillie*, 21 How. St. Tr. 10.; *Fairman v. Ives*, 5 B. & A. 642. Where the libel complained of is a representation made *bonâ fide* to a public officer by the defendant respecting the conduct of the plaintiff, a person under him, it is not *primâ facie* actionable; and this defence may be given in evidence under the general issue. *Blake v. Piffold*, 1 M. & Rob. 198. So a letter to the Postmaster-General complaining of misconduct in a postmaster is not actionable if it contains a *bonâ fide* complaint. *Woodward v. Lander*, 6 C. & P. 548. But where the defendant attacked the character of a Roman Catholic priest by imputing improper conduct as a priest, it was held to be no excuse that the libel was published at a meeting to petition parliament against Roman Catholics. *Hearne v. Stowell*, 12 A. & E. 719.

Where parties thus privileged exceed the limits of their privilege, and use defamatory expressions which the circumstances will not justify, it has been doubted whether they ought to be sued in a common action for slander, or in a special action on the case stating that the matter was spoken maliciously, and without reasonable or probable cause. *Flint v. Pike*, 4 B. & C. 473.; 1 B. & A. 245. (n), in *Hodgson v. Scarlett*, cited by Alderson B. in *Gibbs v. Pike*, 1 Dowd. N. S. 414.

3. Where the words are spoken in confidence, by way of advice, they are privileged. Thus, where a party is applied to for the character of a servant, and in giving that character makes use of defamatory words, it is not actionable. *Edmondson v. Stephenson*, B. N. P. 8.; *Weatherston v. Hawkins*, 1 T. R. 110. But if the supposed libel be not communicated *bonâ fide*, it does not fall within the protection of privileged communications. *Per Bayley J.*, *Pattison v. Jones*, 8 B. & C. 584.; *Kelly v. Partington*, 5 B. & Ad. 645. Whether the master made the communication voluntarily or not, is a circumstance which the jury are to consider in forming an opinion on the *bonâ fides*. "I do not mean to intimate," says Lord Alvanley, in *Roger v. Clifton*, 3 B. & P. 592., "that if a servant were strongly suspected of having committed a felony while in his master's service, the master is not at liberty to warn others from taking him into their service; for it is the duty of every person to guard the public against admitting such servants into their houses." "A master may," says Bayley J., *Pattison v. Jones*, 8 B. & C. 578., "when he thinks that another is about to take into his service one who, he knows, ought not to be taken, set himself in motion, and do some act to induce that other to seek information from, and put questions to, him. The answers to such questions being *bonâ fide*, with the intention of communicating such facts as the other party ought to know, will, although they contain slanderous matter, come within the scope of a privileged communication. But in such a case it will be a question for the jury whether the defendant has acted *bonâ fide*, intending honestly to discharge a duty; or whether he has acted maliciously, intending to do an injury." See *Child v. Affleck*, 9 B. & C. 403. Defamatory words, spoken by way of confidential advice to persons who ask it, or have a right to expect it, are privileged. Thus, in an action for saying of a tradesman, "He cannot stand it long—he will be a bankrupt soon," it appearing that the words were not spoken maliciously, but in confidence and friendship,

and by way of warning, Pratt C. J. directed the jury that they ought to find the defendant not guilty. *Hervey v. Dowson*, B. N. P. 8. See *M'Dougall v. Claridge*, 1 Camp. 267.; *Dunman v. Bigg*, Id. 269. (n). The defendant, the tenant of a farm, required some repairs to be done at the farm house, and B., the agent of the landlord, directed the plaintiff to do them. The plaintiff did them, but in a negligent manner, and during the progress of them got drunk; and circumstances occurred which induced the defendant to believe that the plaintiff had broken open his cellar door, and got liquor there; whereupon the plaintiff, meeting the defendant in the presence of D., charged him with having broken his cellar door, and got drunk, and spoilt the work; and afterwards repeated to D., in the absence of defendant, that the defendant had broken open the door. On the same day he made the same complaint to B. It was held, that the complaint to B. was a privileged communication, if made *bonâ fide*, and without any malicious intention. It was held also, that the statement made to the defendant, in the presence of D., a stranger, was also privileged, if done honestly and *bonâ fide*; and that the circumstance of its being made in the presence of a third person does not of itself make it unauthorised; and that it was a question to be left to the jury to determine, from the circumstances, including the style and character of the language used, whether A. acted *bonâ fide*, or was influenced by malicious motives. But it was held also, that the statement to D., in the absence of the defendant, was unauthorised and officious, and therefore not protected, though made in the belief of its truth, if false in fact. *Toogood v. Spyring*, 1 C. M. & R. 181. S. C. 4 Tyr. 582. See also *Brooks v. Blanshard*, 1 C. & M. 779. S. C. 3 Tyr. 844. A charge of theft made against the plaintiff in the presence of a stranger is privileged, if the defendant believed it to be true and acted *bonâ fide*, and did not make it before more persons, &c. in stronger language than necessary: and it is for the jury, and not the judge, to say whether the facts bring the case within the privilege. *Padmore v. Lawrence*, 11 A. & E. 380. Where a person, having originated false reports prejudicial to a tradesman, was afterwards called on by the employers of the latter to examine the matters complained of, and then repeated to them the false statement, it was held that this communication was not privileged. *Smith v. Matthews*, 1 M. & Rob. 151. The plaintiff and defendant were jointly interested in property in Scotland of which C. was manager: the defendant wrote to C. a letter principally about the property and the conduct of the plaintiff with regard thereto, but containing also a charge against the plaintiff with reference to his conduct to his mother and aunt: it was held, that, though the part of the letter respecting the plaintiff's conduct as to the property was confidential and privileged, such privilege could not extend to the part of the letter about his conduct to his mother and aunt. *Warren v. Warren*, 1 C. M. & R. 250. Where the plaintiff brought an action against the defendant for saying he had heard the plaintiff was hanged for stealing a horse, but it appeared upon the evidence that the words were spoken in grief and sorrow for the news, the plaintiff was nonsuited; there being no proof of malice. *Anon.*, coram Hobart J., cited 1 Lev. 82. But it seems to be no defence to shew that the words were spoken carelessly, wantonly, or in jest. *Hawk*, P. C. b. 1. c. 28. s. 14., 8th ed. The defendant claimed rent of the plaintiff: the plaintiff denied his liability: whereupon the de-

defendant wrote to the plaintiff's agent (who was in correspondence on the subject) a letter in which he insisted on his claim, and further charged the plaintiff with "a mean and dishonest attempt to defraud" the defendant. Held, that such an imputation, being wholly unnecessary, was not privileged. *Tyson v. Evans*, 12 A. & E. 733. Words spoken *bonâ fide*, by way of moral advice, are privileged; as if a man write to a father, advising him to have better regard to his children, and using scandalous words, it is only reformatory, and shall not be intended to be a libel. *Peacock v. Raynell*, 2 Brownl. 151. But if in such case the publication should be in a newspaper, though the pretence should be reformation, it would be libellous. *R. v. Knight, Bac. Ab. Libel*, A. 2. In these cases, if the circumstances attending the writing or speaking of the words be such as *primâ facie* to render them privileged, it is incumbent on the plaintiff, in order to entitle himself to a verdict, to prove malice in fact. *Bromage v. Prosser*, 4 B. & C. 247. But such malice in fact need not be proved by extrinsic evidence; it may be collected by the jury from the libel itself. *Wright v. Woodgate*, 2 C. M. & R. 573.

4. Where defamatory words are spoken or written *bonâ fide* with the view of investigating a fact in which the party is interested, they are privileged. Thus, where the defendant inserted an advertisement in a newspaper to ascertain whether, previously to a certain time, the plaintiff had been married, intending, as the innuendo stated, to insinuate that the plaintiff had been guilty of bigamy, but it appeared that the advertisement was inserted by the authority of the plaintiff's wife, Lord Ellenborough held, that if the investigation was set on foot, and the advertisement published by the plaintiff's wife, from anxiety to know whether she was legally the wife of the plaintiff, it is justifiable. *Delany v. Jones*, 4 Esp. 191. *Finden v. Westlake*, M. & M. 462. So, where the libel was an advertisement for the discovery of the plaintiff, an absconding debtor, published at the request of a party who had sued out a *capias*, for the purpose of enabling the sheriff to take him. *Lay v. Lawson*, 4 A. & E. 795. But if the publication of the libel is more extensive than necessary for the purpose of obtaining information, it will be actionable. *Brown v. Croome*, 2 Stark. 297.

5. Whether the publication of the proceedings of a court of justice, where those proceedings contain defamatory matter, is privileged, has never been solemnly decided; but the inclination of the courts appears to be against the existence of such a privilege. See *Lewis v. Clement*, 3 B. & A. 702.; *Lewis v. Walter*, 4 B. & A. 613.; *Flint v. Pike*, 4 B. & C. 476. 481. But see *Curry v. Walter*, 1 Esp. 456. S. C. 1 B. & P. 525.; *Duncan v. Thwaites*, 3 B. & C. 583.; *Roberts v. Brown*, 10 Bing. 523.; *Delegal v. Highley*, 3 New Ca. 950. The publication of preliminary or *ex parte* proceedings containing defamatory matter is clearly actionable; as a publication of depositions before a justice of the peace on a charge of murder; *R. v. Lee*, 5 Esp. 123.; *R. v. Fisher*, 2 Camp. 563.; *Duncan v. Thwaites*, 3 B. & C. 583.; or proceedings on a coroner's inquisition; *R. v. Fleet*, 1 B. & A. 379.; or before a commissioner appointed by the crown for inquiry into certain public bodies. *Charlton v. Watton*, 6 C. & P. 385.

Where the defence relied on has been, that the libel is a correct account of what passed in a court of justice, it has been the practice to plead that defence specially; but it seems that, if available at all, it

may be taken advantage of under the general issue. Though the defendant cannot plead in justification that the libel is a correct report of a preliminary or *ex parte* proceeding, yet he may, under the general issue, give in evidence the correctness of the report in mitigation of damages; but no evidence of the truth or falsehood of the facts stated at the inquest is in such case admissible on either side. *East v. Chapman*, *M. & M.* 46.; *Charlton v. Watton*, 6 *C. & P.* 385. So under the general issue he may contend that the writing is not injurious; as where the editor of a newspaper reported a former trial for libel, in which the plaintiff recovered a verdict, although the report contained some injurious allegations, yet the judge left it to the jury to say whether, taken altogether, the report was injurious; and the court held it rightly so left. *Chalmers v. Payne*, 2 *C. M. & R.* 156.

6. The defendant may show, under the general issue, that the libel is a fair criticism on the plaintiff's work; but if it contains observations unconnected with the work, and personally slanderous, it is actionable. *Carr v. Hood*, 1 *Camp.* 355. (n).; *Soane v. Knight*, *M. & M.* 74.; *Thompson v. Shackell*, *M. & M.* 187.; *Fraser v. Berkeley*, 7 *C. & P.* 621. A publication is not a libel which has for its object not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality. *Per* Lord Ellenborough C. J., *Tabart v. Tipper*, 1 *Camp.* 352. So the editor of a newspaper may comment on any place of public entertainment; but it must be done fairly, and without malice or view to injure or prejudice the proprietor in the eyes of the public. *Per* Lord Kenyon, *Dibdin v. Swan*, 1 *Esp.* 28. And it is not libellous fairly to comment upon a petition relating to matters of general interest, which has been presented to parliament and published. *Dunne v. Anderson*, *R. & M.* 287. *S. C.* 3 *Bing.* 88.

The defendant in an action for a libel [on the plea of Not guilty] is entitled to have the whole publication read from which the libellous passages are extracted. *Cooke v. Hughes*, *R. & M.* 112.; *Mullett v. Hulton*, 4 *Esp.* 249.

Publication of parliamentary papers.] The court of Q. B. decided, in *Stockdale v. Hansard*, 9 *A. & E.* 1., that the publication of a defamatory libel on a private person could not be justified by merely shewing that it was part of the printed proceedings of the House of Commons, published by order of the House. But, by 3 & 4 *Vict. c. 9.*, all proceedings taken against persons acting under the authority of either House for the publication of reports, papers, votes, or proceedings of either House, shall be stayed upon the certificate of the Lord Chancellor, Speaker, Clerk of the Parliament, or Clerk of the House of Commons; and by sect. 2., in case of any civil proceeding for publishing a copy of such report, paper, &c., the defendant may, at any stage of the proceedings, lay before the court the report, paper, &c., and the copy, and, upon verifying the report, &c., and the correctness of the copy by affidavit, the proceedings shall be stayed. By sect. 3., in any proceeding commenced for printing an extract or abstract of any such report, &c., the defendant may, under the general issue, give in evidence the report, &c., and shew that the extract or abstract was published *bonâ fide*, or without malice; and if such be the opinion of the jury, a verdict of Not guilty shall be entered.

Evidence of the truth of the libel or words.] Where the defendant admits the publishing or speaking of the libel or words as stated, and justifies so doing because they are true, he must plead this matter specially, and he will not be permitted to give it in evidence under the general issue. *Smith v. Richardson, Willes*, 20., 1 *Saund.* 130. (n). And such evidence is inadmissible under the general issue, either in bar of the action or in mitigation of damages. *Ibid.*; *Underwood v. Parks*, 2 *Stra.* 1200. But it is otherwise in the case of slander of title. *Watson v. Reynolds, post.* p. 383. And evidence admissible and pertinent under the general issue cannot be excluded, merely because it happens incidentally to prove the truth of the libel. *Manning v. Clement*, 7 *Bing.* 362.

Evidence that the words were first spoken by another.] It has been said to be a good defence that the defendant was only the repeater of the slanderous words, and that he named the author of them at the time, and stated that he had heard them uttered. *Mills v. Spencer, Holt*, *N. P. C.*, 533. But this is questionable. At all events, the words actually uttered by the third person, and not merely the substance of them, must be proved, so as to furnish the plaintiff with a cause of action against such third person. *Mailland v. Goldney*, 2 *East*, 426. See also *McGregor v. Thwaites*, 3 *B. & C.* 24.; *Lewis v. Waller*, 4 *B. & A.* 605. And it must also be shewn that the defendant believed the words to be true, and that he spoke them on a justifiable occasion. *McPherson v. Daniels*, 10 *B. & C.* 263. The result seems to be that this is a defence only where it amounts to a privileged statement: otherwise it is admissible only in mitigation of damages. See *Bennett v. Bennett*, 6 *C. & P.* 588., and *Speck v. Phillips*, 7 *Dowl. P. C.* 472., *S. C.* 5 *M. & W.* 279.

Accord and satisfaction.] Accord and satisfaction is a good defence to this action, if pleaded; and where the plaintiff had agreed not to bring the action, in consideration of the defendant destroying certain documents relating to the charge imputed to the plaintiff, which the defendant accordingly destroyed, Lord Ellenborough C. J. admitted this as evidence of an accord and satisfaction. *Lane v. Applegate*, 1 *Stark.* 97.

Evidence in mitigation of damages.] It was formerly held that where the defendant pleaded the general issue without a justification, he might prove that the plaintiff had been generally suspected of the offence imputed to him by the defendant; *Earl of Leicester v. Waller*, 2 *Camp.* 251.; — *v. Moor*, 1 *M. & S.* 284.; but Abbott C. J. refused to admit proof of rumours; *Waithman v. Weaver*, *D. & R. N. P. C.* 10., *S. C.* 11 *Price*, 257. (n); and it was afterwards decided that general evidence of the plaintiff's bad character was not admissible in an action for a libel: thus in an action for a libel on the plaintiff tending to injure his credit and reputation in his profession of an attorney, and containing general imputations on his character, to which the defendant pleaded the general issue, and a special plea averring the badness of the plaintiff's character, it was held that general evidence of his bad character and ill repute in business could not be admitted, either to contradict the allegation in the declaration that the plaintiff carried on

the business of an attorney with great credit, in order to mitigate the damages on the general issue; or in support of the averment in the defendant's justification that the plaintiff was a disreputable practitioner. *Jones v. Stevens*, 11 Price, 235. Such evidence was, however, admitted by Lord Tenterden in *Mawby v. Barber*, mentioned in 2 Stark. on Evidence, p. 470., and by Lord Denman C. J., after consulting Parke B., at York Spring Assizes, 1836, in a case of *Moore v. Outler*, where the defendant was allowed to give such general evidence, but not go into particulars; and the same point was ruled accordingly by Coltman J., at the Liverpool Summer Assizes, 1837, in a case of *Hardy v. Alexander*, and is said to have been adopted by the court of Q. B. in *Duncombe v. Daniel*, cited 7 Dowl. P. C. 472. The defendant cannot, in mitigation of damages, give in evidence other libels published of him by the plaintiff, not distinctly relating to the same subject. *May v. Brown*, 3 B. & C. 113.; *Furnerty v. Tipper*, 2 Camp. 77. *Tarpley v. Blabey*, 2 New Ca. 473. But he may do so if they are shewn to be the provocation of that charged; *Watts v. Fraser*, 7 A. & E. 223.; and to have come to his knowledge before the publication of his own libel. S. C. General evidence that the plaintiff has been in the habit of libelling the defendant is not admissible. *Wakley v. Johnson*, R. & M. 422. The defendant may shew, in mitigation, that the libel is a correct report of an investigation at a coroner's inquest. *East v. Chapman*, M. & M. 46. Where the defendant published an imperfect account of a trial, which was libellous, he was allowed in mitigation, under the general issue, to shew that he had copied the statement from another newspaper; but not that it had appeared concurrently in several newspapers. *Saunders v. Mills*, 6 Bing. 213. This case has been questioned, and evidence that the defendant had the libel from a correspondent was refused in *Talbutt v. Clark*, 2 M. & Rob. 312.; and, in *Creevy v. Carr*, 7 C. & P. 64., the defendant was not allowed to show in mitigation of damages that the alleged libel had appeared in another newspaper, and that the plaintiff had brought an action against the proprietors of that newspaper, and recovered damages.

By stat. 6 & 7 Vict. c. 96. s. 1. the defendant may (after notice given at the time of delivering the plea) shew in mitigation that he made or offered an apology before action brought, or as soon after as he had an opportunity, in case the action was commenced before there was an opportunity.

Slander of title.] This is not strictly an action for defamation, but an action for special damage to the plaintiff's title by a false and malicious statement. *Malachy v. Soper*, 3 New Ca. 371.; *Gutsole v. Mathers*, 1 M. & W. 499. If the defendant, being interested and not a mere stranger, makes the statement (though untrue) *bonâ fide*, and on reasonable grounds, he is not liable. *Watson v. Reynolds*, 1 M. & M. 1. And it was held (before the new rules of pleadings) that the plaintiff's title might be shewn to be defective under the general issue; for if the plaintiff has no title, he has sustained no legal damage. S. C. and note (a), *ibid.* And it seems that the allegation of falsehood in the declaration is unnecessary; for the malicious interference of a mere stranger is actionable. *Rowe v. Roach*, 1 M. & S. 304.

CASE FOR MALICIOUS PROSECUTION.

In an action on the case for malicious prosecution the plaintiff may, by proper pleas, be put to prove, 1. the prosecution of the plaintiff; 2. its determination; 3. that the defendant was the prosecutor; 4. his malice and want of probable cause; and, 5. the damages sustained.

Evidence of prosecution.] The fact of the prosecution is usually proved by the production of the record, or of an examined copy. *B. N. P.* 13. And the record or copy is admissible without proof of an order of the court, or *fiat* of the attorney general, allowing the plaintiff a copy of such record. *Leggatt v. Tollervey*, 14 *East*, 302.; *Caddy v. Barlow*, 1 *M. & R.* 275. In an action for a malicious prosecution by indicting the plaintiff, it is not sufficient to produce the original indictment; but a record should be made up, and the original, or a copy, produced, *antè*, p. 73, 74. Some proof must be given of the identity of the plaintiff and the party prosecuted.

The prosecution may be put in issue by a plea of *nul tiel* record, where it is alleged on the declaration with a *prout patet*, &c., on which issue the original record should be produced. See *antè*, p. 73. But the plea of Not guilty seems to have the same effect, as before the new rules of pleading, in putting the plaintiff to prove the wrongful act, viz. the prosecution. See *Drummond v. Pigou*, 2 *New Ca.* 115.

A variance between the charge actually made, and that stated in the declaration, was formerly fatal. Thus where it was stated in the declaration that the defendant imposed upon the plaintiff the crime of felony, and it appeared that the charge in the information amounted only to a civil injury, though the warrant was to arrest the plaintiff on suspicion of felony, the variance was held fatal. *Leigh v. Webb*, 3 *Esp.* 165. But where the declaration averred that the defendant charged the plaintiff with assaulting and beating him, and procured a warrant to apprehend him for his said offence; and the charge in fact made was for assaulting and *striking*, and the warrant produced recited the charge to be for violently *assaulting*, it was held to be no variance. *Byne v. Moore*, 5 *Taunt.* 187. (*quære* the marginal note?) And where the declaration stated a malicious charge of having feloniously stolen certain articles, and the proof was that the defendant laid an information, in which he deposed that the articles had been stolen, and that he suspected and believed they had been stolen by the plaintiff, it was held no variance. *Davis v. Noake*, 6 *M. & S.* 29. An allegation that the defendant maliciously and without probable cause preferred an indictment, &c. is proved, if *some* of the charges in the indictment were malicious and without probable cause. *Reed v. Taylor*, 4 *Taunt.* 617. Variances of this kind are not so important as they were before the power of amendment at *Nisi Prius* was introduced. See, generally, *antè*, p. 67.

If the proceeding was by preferring a charge before a magistrate, the magistrate or his clerk should be served with a *subpœna duces tecum* to produce the proceedings. Where the information was laid by the defendant, his oath and handwriting should be proved, as also the issuing the warrant to the constable, &c. The warrant must also be produced and proved, and evidence must be given of the apprehension and detention of the plaintiff under it. 2 *Stark. Evid.* 910. 1st ed.; and see *Freeman v. Arkell*, 2 B. & C. 494. Where the action is for maliciously procuring the plaintiff to be arrested upon a warrant on a charge of felony, and it does not appear that any information has been taken, evidence may be given of the warrant without proving any information. *Newsam v. Carr*, 2 *Stark.* 69. See *Clarke v. Postan*, 6 C. & P. 423.

Evidence of determination of prosecution.] It must appear that the prosecution is determined; for otherwise *non constat* that the plaintiff may not be convicted, and the prosecution thereby shewn to be just. *Arundell v. Tregono*, *Yelv.* 117.; *B. N. P.* 13. The return of *no bill* by the grand jury, or the verdict of acquittal, will be evidence of this fact; and an averment that the plaintiff, "by a *jury* of the said county, &c. was duly and in a lawful manner acquitted," is proved by a record, by which it appears that the jury found the plaintiff not guilty, and that judgment of acquittal was given (as in strictness it always is) by the court. *Hunter v. French*, *Willes*, 517. Where the declaration averred that the defendants "did not prosecute the suit complained of, but therein made default, and their pledges were in mercy, &c.," it was held that the production of a rule to discontinue did not prove the averment. *Webb v. Hill*, *M. & M.* 253. An action lies, though the plaintiff was acquitted on a mere defect in the indictment. *Wicks v. Fentham*, 4 T. R. 247.; *Pippet v. Hearn*, 5 B. & A. 634.

The termination of the proceedings is not put in issue by a plea of Not guilty, but must be specially traversed. *Drummond v. Pigou*, 2 *New Ca.* 114.; *S. C.* 2 *Scott*, 228.

Evidence that defendant was prosecutor.] The proper evidence to establish this fact is that the defendant employed an attorney or agent to conduct the prosecution; that he gave instructions concerning it; paid the expenses; procured the attendance of witnesses; or was otherwise active in forwarding the prosecution. 2 *Stark. Evid.* 908. 1st. ed. Proof of the information of the defendant taken by the magistrate is sufficient for this purpose. 2 *Phill. Ev.* 161. So the recognizance to prosecute entered into by the defendant. *Eager v. Dyot*, 5 C. & P. 4. The indorsement of the defendant's name on the bill is evidence that he was sworn as a witness; but not of his being the prosecutor. *B. N. P.* 14. One of the grand jury, before whom the bill was preferred, may be called to prove that the defendant was the prosecutor; *Sykes v. Dunbar*, *Selv. N. R.* 1004. But this has been questioned. 2 *Stark. Slander*, 70. Where the proceeding was before a magistrate, he may be called to prove it; as was done in *Freeman v. Arkell*, 2 B. & C. 494.

Evidence of malice.] It is essential that the plaintiff should give some evidence of the defendant's malice; and malice is in issue on a plea of Not guilty. *Porter v. Weston*, 5 *New Ca.* 715. Proof of an acquittal

for want of prosecution is not even *prima facie* evidence of malice to support the action. *Purcell v. Macnamara*, 9 East, 361. If the plaintiff proves want of probable cause, malice may be inferred. *Ibid.*; *Burley v. Bethune*, 5 Taunt. 583. But the want of probable cause is only presumptive evidence of malice, and must not be left to the jury as conclusive. *Mitchell v. Jenkins*, 5 B. & Ad. 588. Proof that the defendant published an advertisement of the finding of the indictment, with other scandalous matter, is evidence of malice. *Chambers v. Robinson*, 1 Stra. 691. In an action by A. for the malicious prosecution by the defendant of an indictment against A. and B., evidence of the misconduct of defendant towards B. after his apprehension, tending to shew bad motives, is admissible in proof of malice. *Caddy v. Barlow*, 1 M. & R. 275.

Evidence of want of probable cause.] The plaintiff must give some evidence of want of probable cause; and this on the general issue. *Colton v. Browne*, 3 A. & E. 312. The reasonable cause must be existing in the mind of the defendant at the time of the prosecution, and not come to his knowledge since. *Delegal v. Highley*, 3 New Ca. 950. Slight evidence is sufficient. *Taylor v. Willans*, 2 B. & Ad. 857. But proof even of express malice is not evidence of it. *Johnstone v. Sutton*, 1 T. R. 545.; *Turner v. Turner*, Gow. 20. So abandoning the prosecution is not of itself sufficient evidence of want of probable cause; *Incedon v. Berry*, 1 Camp. 203. (n): nor neglecting to prefer an indictment after a charge laid. *Wallis v. Alpine*, Id. 204. (n); *Willans v. Taylor*, 6 Bing. 188. So proof that the bill was thrown out by the grand jury has been held not evidence of the want of probable cause. *Byne v. Moore*, 5 Taunt. 187. But in *Nicholson v. Coghill*, 4 B. & C. 23., it was said by the Court, that evidence of the bill having been thrown out by the grand jury is sufficient to warrant an inference of the absence of probable cause; at least where the facts are within the defendant's peculiar knowledge. Proof that the defendant did not himself believe the charge to be true is evidence of want of probable ground for it, though there be some evidence of probable cause besides. *Broad v. Ham*, 5 New Ca. 722. Where it appeared that the plaintiff refused to give up a forged note, which he had taken in the course of business, to the defendant, a bank inspector; and the defendant, in the absence of all circumstances of suspicion, charged the plaintiff before a magistrate with feloniously having the note in his possession, it was held to be evidence of want of probable cause to go to the jury. *Brooks v. Warwick*, 2 Stark. 389. The motives of the party are for the consideration of the jury. *Taylor v. Willans*, 2 B. & Ad. 845; *Venafrá v. Johnson*, 10 Bing. 301.; *Musgrove v. Newell*, 1 M. & W. 582. If the defendant has laid all the facts of the case fully and fairly before counsel, and acted *bona fide* upon the opinion given (however erroneous it may be), it will be evidence to prove probable cause; *per* Bayley J., *Ravenga v. Mackintosh*, 2 B. & C. 697.; *Hewlett v. Cruchley*, 5 Taunt. 281. Where there are no facts, nor any inferences from facts, in dispute, "reasonable and probable cause" is a pure question of law, and the judge may nonsuit the plaintiff, if he thinks there was such cause. *Blachford v. Dod*, 2 B. & Ad. 179.; *Panton v. Williams*, 2 Q. B. 169.; *Mitchell v. Williams*, 11 M. & W. 205. But where there are facts in evidence tending to shew that the defendant knew his charge to be un-

warrantable; or where the question is mixed up with disputed facts, the judge cannot nonsuit the plaintiff, but must leave the case to the jury. *M^cDonald v. Rooke*, 2 *New. Ca.* 217.; *James v. Phelps*, 11 *A. & E.* 483.

It has been said that where the facts lie in the knowledge of the defendant himself, *he* must shew probable cause, though the indictment be found by the grand jury; otherwise the plaintiff shall recover without proving express malice. *Parrot v. Fishwick*, *B. N. P.* 14. But this position is not supported by another report of the same case, 9 *East*, 362. (n.), from which it appears that, the plaintiff having been acquitted on the indictment, Lord Mansfield said, "it was not necessary to prove express malice, for, if it appeared there was no probable cause, that was sufficient to prove an implied malice, which was all that was necessary to support this action." In this case all the facts lay in the defendant's own knowledge, and if there was the least foundation for the prosecution, it was in his power, and incumbent upon him, to prove it." It seems therefore from this report that some evidence of want of probable cause had been given from which malice was inferred, and that the question was whether it was incumbent upon the plaintiff to go further. In *Sykes v. Dunbar*, cited 9 *East*, 363., where the defendant was the only witness upon the indictment, Lord Kenyon ruled that the proof of malice lay upon the plaintiff. And it was said by Tindal C. J. that the plaintiff must take the first step, because it is not to be presumed that any one has acted illegally: there must, therefore, be some evidence of want of probable cause before the defendant can be called upon to justify his conduct. *Willans v. Taylor*, 6 *Bing.* 187.; *S. C.*, on error, 2 *B. & Ad.* 845. In that case the defendant presented two bills for perjury against the plaintiff, but did not himself appear before the grand jury, and the bills were ignored: he then presented a third bill, and, on his own testimony, it was found: the prosecution was kept suspended by the defendant for three years, till the plaintiff taking the record down to trial, and the defendant declining to appear as a witness, although in court and called, the plaintiff was acquitted: it was held that this was sufficient *prima facie* evidence of want of probable cause. Want of probable cause is in effect the evidence of a negative, and very slight evidence of a negative is sufficient to call upon the other party to prove the affirmative. *Per* Lord Tenterden C. J., *Cotton v. James*, 1 *B. & Ad.* 133. When the action is for malicious indictment for perjury, in which there were several assignments of perjury, the plaintiff is entitled to recover if he shews that, as to one of them, there was no probable cause. *R. v. Prosser*, cited 1 *T. R.* 533.; but he will not get the costs of witnesses, &c. brought to negative the other assignments. *Delisser v. Towne*, 1 *Q. B.* 333.

The observations of the judge on the trial of the indictment, tending to cast censure on the mode in which the prosecution had been conducted, were admitted for the plaintiff by Littledale J., in *Warne v. Terry*, *Winton Sum. As.* 1836, on the same principle on which the deliberation of the jury had been held by Lord Kenyon to be evidence for the defendant of probable cause (see *post*, p. 388., *Smith v. Macdonald*); but in *Barker v. Angell*, 2 *M. & Rob.* 371., Lord Denman refused to admit similar proof.

Damages.] The jury may give damages for the loss of reputation, the imprisonment (if any have taken place), and the expenses incurred

by the plaintiff in making his defence. *B. N. P.* 13. See further, as to the amount of damage, *post*, p. 391.

Defence.

The defendant may prove the plaintiff's guilt; for this shews good ground for prosecution, *B. N. P.* 15.; and for this purpose, it seems, he may use the depositions or testimony given by himself at the previous trial; *Id.* 14.; *Jackson v. Bull*, 2 *M. & Rob.* 177.; or those of his wife; at least where there was no other evidence given on that occasion. *B. N. P.* 15.

In order to shew probable cause for the prosecution, the defendant may prove that the jury deliberated long on the trial of the indictment. *Smith v. Macdonald*, 3 *Esp.* 7. And Lord Kenyon ruled that the defendant might give evidence of the plaintiff's bad character; *Rodriguez v. Tadmire*, 2 *Esp.* 721.; but in later cases such evidence has been refused, on the ground that it afforded no proof of probable cause to justify the defendant. *Newsam v. Carr*, 2 *Stark* 70.; *Cornwall v. Richardson*, *R. & M.* 305.; see also *Downing v. Butcher*, 2 *M. & Rob.* 374.

It is no answer that the defendant was bound over to prosecute, if the jury think that he maliciously caused himself to be so bound by making an ungrounded charge. *Dubois v. Keats*, 11 *A. & E.* 329.

CASE FOR A MALICIOUS ARREST, &c.

In an action on the case for a malicious arrest, the plaintiff may have to prove the suing out a *capias* in the former action; the arrest under it; the determination of the suit; the defendant's malice and want of probable cause; and the damage.

The writ.] As to proof of the writ, see *antè*, p. 75.

The arrest.] The plea of Not guilty puts in issue the arrest by the procurement of the defendant. *Watkins v. Lee*, 5 *M. & W.* 270.

If the form of the pleadings requires it, the plaintiff should be prepared to prove the affidavit to hold to bail, by the production of the original, or of an examined copy; *Crook v. Dowling*, 3 *Doug.* 75., *S. C. B. N. P.* 14.; *Casburn v. Reed*, 2 *B. Moore*, 60.; *Rees v. Bowen*, 1 *M. Cl. & Y.* 392.; but unless there be an allegation in the declaration that the writ was indorsed for bail "by virtue of an affidavit filed," &c., it is unnecessary to prove the affidavit, *Arundell v. White*, 14 *East*, 224.; unless for the purpose of connecting the defendant with the arrest. In one case, though the return of *cepi corpus* appeared on the writ, Lord Kenyon ruled, that, as against the defendant, there was no evidence of the arrest having been under the writ, and the plaintiff, not being able to prove the warrant, was non-suited. *Lloyd v. Harris, Peake*, 174. But it seems that the sheriff's return is *prima facie* evidence of the fact therein stated; *Gyfford v. Woodgate*, 11 *East*, 297.; *Rogers v. Ilcombe*,

2 *Esp. Dig. N. P.* 38. ; and proof of the warrant is unnecessary where the defendant has admitted that the arrest took place under the writ. *Petrie v. Lamont*, 3 *M. & G.* 702. In order to prove the arrest, the plaintiff may call the sheriff's officer. If a bailiff, who has a process against any one, says to him, whether on foot or riding, "You are my prisoner ; I have a writ against you ;" upon which he submits, and goes with him, though the bailiff never touches him, yet this is an arrest, because he has submitted to the process ; but if, instead of going with the bailiff, he had gone away or escaped, it would be no arrest, unless the bailiff had actually laid his hand on him. *Horner v. Battyn*, *B. N. P.* 62. Placing a party under restraint of a sheriff's officer who holds a writ of *capias*, may be an arrest without proceeding to actual contact. *Grainger v. Hill*, 4 *New Ca.* 212. Where a sheriff's officer, having a warrant to arrest the plaintiff, sent a message to him to fix a time to call and give bail, and plaintiff accordingly fixed a time, attended, and gave bail, this was held to be no arrest for which this action could be maintained. *Berry v. Adamson*, 6 *B. & C.* 528. ; *Goye v. Radford*, 3 *C. & P.* 464. See also *Bieten v. Burrige*, 3 *Camp.* 140. *post*, p. 391 ; and see further what constitutes an arrest, *post*, "*Actions against Constables.*" Proof of detainer satisfies the allegation of an arrest. *Whalley v. Pepper*, 7 *C. & P.* 506.

Determination of the suit.] The determination of the suit, where it is material, must be specially traversed, and is not put in issue by the plea of Not guilty. *Watkins v. Lee*, 5 *M. & W.* 270. But the allegation is immaterial, when the action is for malicious abuse of the process of the course for the purpose of vexation. *Heywood v. Collinge*, 9 *A. & E.* 269. It is necessary to shew that the proceeding complained of, whether civil or criminal, terminated, and how ; and the proof must correspond with the allegation. Therefore where it was averred that "the plaintiffs in that action did not prosecute their suit, but therein made default," &c., it was ruled that this, being an allegation of a nonsuit, was not proved by a rule to discontinue. *Webb v. Hill*, *M. & M.* 253. The declaration stated that it was referred to the prothonotary to ascertain the debt, the costs to be in his discretion ; that he found the debt to be, &c., and ordered the plaintiff to pay the costs, "whereupon and whereby the said suit was ended and determined." It was proposed to prove that a rule had been obtained to refer the action to the prothonotary ; that the parties attended him ; that he found the debt due, and that the plaintiff accepted that and the costs : held, that this evidence was not admissible under the allegation in the declaration, Patteson J. observing that the mere acceptance of debt and costs, without the intervention of the court, could not properly be called a determination of the suit. *Combe v. Capron*, 1 *M. & Rob.* 398. Proof of a rule to discontinue, and that the costs have been accordingly taxed and paid, is sufficient evidence of the determination of the suit. *Bristow v. Haywood*, 4 *Camp.* 214. ; *Gadd v. Bennett*, 5 *Price*, 540. ; *Brandt v. Peacock*, 1 *B. & C.* 649. So a rule to stay proceedings, and to deliver up to the then defendant the bill of exchange upon which the action was brought. *Brook v. Carpenter*, 3 *Bing.* 297. But where the evidence of the determination of the suit was a judge's order to stay proceedings on payment of costs, Lord Kenyon was inclined to think that it was insufficient, and a juror was afterwards with-

drawn. *Kirk v. French*, 1 *Esp.* 80. Not declaring for a year after the return of the writ is evidence of the determination of the suit, and will support an averment that the party did not declare, but permitted the suit to be discontinued. *Pierce v. Street*, 3 *B. & Ad.* 397. In an action for a false arrest upon a plaint in the Sheriff's Court of London, evidence was given that the usual course of that court, upon the abandonment of a suit by the plaintiff, was to make an entry in the minute-book of "withdrawn:" it was held that proof of such entry in the minute-book was sufficient to prove the determination of the suit. *Arundell v. White*, 14 *East*, 216. The termination must be such as to afford *prima facie* evidence that the action was without foundation; therefore where it appeared that a *stet processus* had been entered by consent, the plaintiff was nonsuited; for the defendant might have recovered in the former action, if the plaintiff had not stopped it by consent. *Wilkinson v. Howel*, *M. & M.* 495.

In an action for maliciously suing out a commission of bankrupt, it must be averred and, if traversed, proved, that the commission was superseded before the commencement of the action. *Whitworth v. Hall*, 2 *B. & Ad.* 695. But the plea of Not guilty does not put the plaintiff to this proof. *Atkinson v. Raleigh*, 3 *Q. B.* 79. An action for abuse of process in order to extort the plaintiff's property is not in the nature of an action for malicious arrest, so as to make it necessary to aver or prove a determination of the suit, or the want of probable cause. *Grainger v. Hill*, 4 *New Ca.* 212.; and see *Heywood v. Collinge*, *ante*, p. 389.

Evidence of malice, and want of probable cause.] It lies upon the plaintiff in this action, (as in the action of case for a malicious prosecution, *ante*, p. 385, 386.,) to prove both malice and the want of probable cause; and these are put in issue under Not guilty. *Watkins v. Lee*, 5 *M. & W.* 270.; *Hounsfield v. Drury*, 11 *A. & E.* 98. Proof that the suit was discontinued was held by Lord Ellenborough not to be evidence of want of probable cause; *Bristol v. Heywood*, 1 *Stark.* 50.; but in a later case, where the defendant had arrested the plaintiff on an affidavit of debt for money paid to his use, but did not declare until ruled to do so, and soon afterwards discontinued the action and paid the costs, this was held to be evidence to go to the jury of malice and want of probable cause. *Nicholson v. Coghill*, 4 *B. & C.* 21.; *Webb v. Hill*, *M. & M.* 254. If A., knowing plaintiff to be an attorney in practice, wilfully and maliciously causes him to be arrested on mesne process, an action on the case lies against A., and the fact of his having a good cause of action for a large sum will be no ground of defence; and the attorney of A. may be joined in the action, if, besides acting as attorney, he co-operated with A. in causing the arrest. *Whalley v. Pepper*, 7 *C. & P.* 506. That the defendant suffered himself to be non-prossed in the former suit has been held not to be evidence to support this action. *Sinclair v. Eldred*, 4 *Taunt.* 7. However, in a previous case of *Hamilton v. Reddell*, coram Pratt C. J., *Beacroft's MSS.* 22. (not cited in *Sinclair v. Eldred*), it was ruled that the defendant's suffering the former action to be non-prossed was sufficient *prima facie* evidence of malice; and per Pratt C. J. "The defendant's never proceeding, and suffering a non-pros., is, in my opinion, *prima facie* evidence of malice. I hold most clearly that the affidavit, arrest, bail, and non-pros. make up sufficient *prima facie* evidence to call for a defence." Where there are mutual

dealings between the plaintiff and defendant, and items are known to be due on both sides of the account, an arrest for the amount of one side only, without deducting what is due on the other, is malicious and without probable cause. *Austin v. Debnam*, 3 B. & C. 139., overruling *Brown v. Pigeon*, 2 Camp. 594. Taking a less sum out of court, and not proceeding in the suit, is not enough in itself to shew want of probable cause of action for a larger sum. *Jackson v. Burleigh*, 3 Esp. 34. And suing out a writ, and arresting a debtor after payment of the debt by him to the creditor's agent, the affidavit to hold to bail being made before such payment, does not afford evidence of malice. *Gibson v. Chaters*, 2 B. & P. 129. A. sued out a bailable writ against B., and the officer told B. of it, but did not take him into actual custody. On the mistake being discovered, B. was told that he need give himself no further trouble in the matter. He afterwards, however, put in bail, and incurred an expense of 14l. Held, that no action lay; there being no arrest, nor any inconvenience except what he had voluntarily brought upon himself. *Bieten v. Burrige*, 3 Camp. 140. So where the plaintiff was actually arrested on a bill which purported to be, but was not in fact, accepted by him, it was ruled that no action lay; the defendant having acted through mistake, and without malice. *Spencer v. Jacob*, M. & M. 180. In an action for maliciously suing out a commission of bankrupt, a supersedeas is not alone evidence of want of probable cause. *Hay v. Weakley*, 5 C. & P. 361.

The question in this action is whether the original plaintiff had a probable cause of action for the amount for which he held the party to bail, and not whether he had a probable cause of action in the particular form of action brought; thus when A. had a good cause of action on a covenant for a sum of 1150l. against B. and C. separately, but not jointly, and he sued B. and C. jointly, and arrested B. in that action for the amount, it was held that an action for a malicious arrest would not, on that account, lie at the suit of B. *Whalley v. Pepper*, 7 C. & P. 506.

In an action for not accepting the debt and costs from a party in custody under a *ca. sa.*, the refusal of the plaintiff in the former action to sign a discharge to the sheriff on tender of the debt and costs, is *prima facie* evidence of malice. *Crozer v. Pilling*, 4 B & C. 26.

Damages.] If more than one are found guilty it must be for joint acts, and the damages must be joint. *Hilditch v. Eyles*, 2 Selw. N. P. 1092., 9th ed. And where there are several plaintiffs, they can only recover for joint damage, as for the expenses of the action defended on their joint retainer. *Barratt v. Collins*, 10 B. Moore, 446.; *Pechell v. Watson*, 8 M. & W. 691.

In an action for a malicious arrest, the Court of Common Pleas determined that the plaintiff was not entitled to recover more on account of costs than the taxed costs which he had incurred. *Sinclair v. Eldred*, 4 Taunt. 7.; and see *Rogers v. Ilcombe*, 2 Esp. Dig. N. P. 38.; *Jenkins v. Biddulph*, 4 Bing. 160. And Best C. J. ruled the same way in *Webber v. Nicholas*, R. & M. 419. But Lord Ellenborough held that he might recover the amount of costs as between attorney and client. *Sandback v. Thomas*, 1 Stark. 306. So Lord Abinger C. B. in *Gould v. Barratt*, 2 M. & Rob. 171. See *Jones v. Dyke*, Sugd. V. & P. App. 8.; *Hodges v. Earl of Litchfield*, 1 New Ca. 500.; *Grace v. Morgan*,

2 *New Ca.* 534.; and the opinions thrown out by the Court in *Doe v. Füller*, 11 *M. & W.* 80.

Competency of witness.] An arbitrator to whom the former cause had been referred, and who, on the examination of the parties and inspection of the plaintiff's books, had awarded that he had no cause of action, was rejected by Lord Kenyon when produced as a witness to prove the malice in this action, upon the principle that, as the parties themselves could not have been examined in the former cause in court, and as the plaintiff could not have been compelled by a judge at Nisi Prius to produce his books, the arbitrator ought not to be permitted to give evidence derived from those sources; *Habershon v. Trosby*, 3 *Esp.* 38.; but the principle of this decision seems questionable; and see *Gregory v. Howard*, 3 *Esp.* 113.

CASE FOR EXCESSIVE DISTRESS.

In an action for an excessive distress, founded on the statute of Marlbridge, the declaration states the tenancy of the plaintiff at a certain rent; the rent due; the taking goods of much greater value than the rent in arrear and charges of the distress.

Evidence of the tenancy and rent due.] The usual allegation in the declaration is general, that the plaintiff held and enjoyed certain premises as tenant thereof to the defendant, which must be proved in the usual manner; that is, by production and proof of the lease; by the defendant's receipts for rent or other admissions by him of the terms; or by parol evidence of the contract where there is none in writing. See *anté*, p. 1, 2. The tenancy must be proved as laid; thus if the rent is stated to be due to A., and it appears that the distress warrant was signed by A. only as agent to B., the real lessor, it is a variance. *Ireland v. Johnson*, 1 *New Ca.* 162. So a variance in the situation of the premises was formerly held fatal. *Harris v. Cook*, 8 *Taunt.* 539.

It is not necessary to prove that the exact sum, stated as due under a videlicet, was in arrear. *Sells v. Hoare*, 8 *B. Moore*, 451.; *S. C.* 1 *Bing.* 401.

Proof of the distress.] The plaintiff must prove that his goods were distrained; but it is not necessary to shew that they were sold or taken away; the seizure as a distress is sufficient. *Sells v. Hoare*, 8 *B. Moore*, 453.; *Baylis v. Usher*, 4 *Moore & P.* 790. Where the landlord's agent went upon the tenant's premises, walked round them, and gave a written notice that he had distrained certain goods lying there for arrear of rent, and then went away not leaving any person in possession; it was held that this was a sufficient seizure to give the tenant a right of action for an excessive distress; for the statute 11 G. 2. c. 19. s. 10. gives the landlord power to impound, or secure on the premises, goods distrained for rent. *Swann v. Earl of Falmouth*, 8 *B. & C.* 456. So where

the tenant paid the expenses of levy, under protest, before any seizure or inventory made. *Hutchins v. Scott*, 2 M. & W. 809.

The fact of the distress may be proved by calling the broker or other person who made the distress, and who will prove his authority from the defendant. If this evidence cannot be procured, the plaintiff should serve a notice to produce the warrant of distress and give secondary evidence of it; or should connect the act of the bailiff with the defendant by some other evidence.

Proof of the excess.] When a landlord is about to make a distress, he is not bound to calculate very nicely the value of the property seized; but he must take care that some proportion is kept between that and the sum for which he is entitled to take it. *Per Bayley J., Willoughby v. Backhouse*, 2 B. & C. 823. Where seven guineas were in arrear, and goods were taken, valued by the plaintiff's witness at 30*l.*, but which, in fact, sold for only 10*l.*, it was contended that the plaintiff ought to be nonsuited; but Lord Ellenborough left the case to the jury, and said, "There is a distinction between the cases where there is but one thing that can be distrained, and where there are many, and so the distress is divisible. If there is but one thing that can be taken, so that it must be taken or the party must go without his distress, no action lies, though it much exceeds the sum for which the distress is taken. But if there are several articles of some value, and there is much more taken than is sufficient to satisfy the rent and expenses, this action is maintainable, and express malice is not necessary to maintain the action nor required to be proved." *Field v. Mitchell*, 6 Esp. 71. A landlord is liable to damages in an action on the case for an excessive distress where the excess consists wholly in seizing growing crops, the probable produce of which is capable of being estimated at the time of the seizure; but the measure of damages is not the value of the crops, but the inconvenience and expense which the tenant sustains in being deprived of the management of them, or which he is put to in procuring sureties to a larger amount than he would otherwise have been, on replevying the crops. *Piggott v. Birtles*, 1 M. & W. 441. An action is not maintainable for distraining beasts of the plough, when there is no other sufficient subject of distress on the premises, besides growing crops. *S. C.*

Where the action is for excessive distress for rent due, the plaintiff cannot recover if the distress be not excessive with reference to the real rent, though the distress warrant be for more than is due. *Crowder v. Self*, 2 M. & Rob. 190. But in such case an action would lie at common law for distraining for more rent than was due. *Taylor v. Henmker*, 12 A. & E. 488. Where the defendant distrained goods worth 30*l.* or 40*l.* for the rent of 10*l.* after a tender of the latter sum, the plaintiff was held entitled to waive the trespass, and to sue for excessive distress. *Branscombe v. Bridges*, 3 Stark. 171.; *S. C.* 1 B. & C. 145.

In order to establish the excess, the plaintiff must be prepared with proof of the value of the goods seized. In an action for an excessive distress the counsel for the plaintiff proposed to ask a witness what sums he thought might have been obtained for the goods distrained from an incoming tenant in the same line of business as the plaintiff; but, *per Parke B.*, "At present that is not the question: To determine whether the distress was excessive, you must ascertain what the goods

seized would have sold for at a broker's sale. If it be excessive, the plaintiff is entitled to recover the fair value of them." *Wells v. Moody*, 7 C. & P. 59.

Damages.] In *Grace v. Morgan*, 2 New Ca. 534., it was held that the plaintiff could not recover in this action the extra costs of a replevin suit in respect of the same distress, of which he had received the taxed costs.

Defence.

The new rules of pleadings have not affected the provisions of sect. 21. of stat. 11 G. 2. c. 19., which gives the defendant the power of shewing special matter under the general issue. *Williams v. Jones*, 11 A. & E. 643. The plea of Not guilty therefore puts the plaintiff on proof of his whole declaration where the action relates to any distress on premises chargeable with a rent to which the distrainor is entitled; and the defendant may shew under it any defence. The defendant may give evidence that the distress was not excessive, or that the chattel distrained was entire, and that there was no other distress. *Field v. Mitchell*, 6 Esp. 71. Where the plaintiff has previously recovered in replevin for the same taking, such recovery was held a bar to this action in *Phillips v. Berryman*, 3 Doug. 286.; S. C. cited *Sells v. N. P. Distress*, ix.; but the contrary seems to be assumed in *Grace v. Morgan*, 2 New Ca. 534., cited *supra*. Where there has been an excessive distress, it is no defence that the plaintiff, after the distress, authorized the defendant to sell, and gave him other powers with regard to the goods seized. *Willoughby v. Backhouse*, 2 B. & C. 821.; *Sells v. Hoare*, 8 B. Moore, 451., S.C., 1 Bing. 401. The defendant is not bound by his notice of distress, but may abandon it, and shew that more rent was due than is there stated. *Gwinnet v. Phillips*, 3 T. R. 645.; *Crowther v. Ramsbottom*, 7 T. R. 658. And he may distrain for rent due before a previous distress, although such previous distress purported to be for all rent due at that time, and although the second distress purported to be for rent due since the first. *Gambrell v. Falmouth*, 4 A. & E. 73.

COVENANT.

The evidence in this action depends on the nature of the action, and of the issue joined in each particular case.

Evidence on plea of non est factum.] By the rules of H. T. 4 W. 4., the plea of *non est factum* operates as a denial of the execution of the deed in point of fact only, and all other defences are to be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable. Under this plea the plaintiff must produce and prove the execution of the deed, see *ante*, p. 87.; and where the action is not for any liquidated sum, it is also necessary to prove the amount of damage. Where *profert* has been made and *non est factum* pleaded, the plaintiff at the trial will not be allowed to prove

that the deed has been destroyed, and to give secondary evidence of its contents. *Smith v. Woodward*, 4 East, 585. And it has been held too late at *nisi prius* to move to put off the trial in order to amend the declaration by inserting an excuse of *profort*; nor will the judge permit the amendment to be made at *nisi prius*. *Paine v. Bustin*, 1 Stark. 74. But where the deed is pleaded as a lost deed, and is found before the trial, it may be given in evidence. *Hawley v. Peacock*, 2 Camp. 557.

By analogy to the cases determined on bills of exchange, the want of a proper stamp, or the alteration of the instrument since execution, may be shewn on this plea. *Jervis's New Rules*, p. 130. n. (a.) 4th ed.; *antè*, p. 223.; *post*, 402.

As to the effect of a variance between the deed set out and that produced, see *antè*, p. 65, 66. It is no variance, where the *profort* is "of the said indenture," to give in evidence a counterpart. *Pearse v. Morrice*, 3 B. & Ad. 396. Variances of this kind are now amendable; see *antè*, p. 67—70.

Evidence on plea of assignment.] In an action against the assignee of a term on a covenant in the lease, he may plead that he assigned the term before breach; and if the plea be traversed, he must prove the assignment as stated. When the defendant proved that, though he had executed the assignment, it had not been delivered to the assignee, but remained in the hands of the solicitor of the defendant who had a lien upon it, it was held sufficient. *Odell v. Wake*, 3 Camp. 394. The defendant need not prove notice of the assignment to the plaintiff, nor the assent of the assignee to the assignment; for it is presumed. *Pitcher v. Tovey*, 1 Salk. 81.; *Taylor v. Shum*, 1 B. & P. 21.; and see *Townson v. Tickell*, 3 B. & A. 31.

Evidence on plea of expulsion.] In covenant for non-payment of rent, where the defendant pleads an expulsion, proof of a mere trespass will not maintain the plea. *Hodgskin v. Queenborough*, Willes, 131.; *B. N. P.* 177. Expulsion from part by the landlord is a suspension of the whole rent. *Co. Litt.* 148. b.; *Walker's case*, 3 Rep. 22. b. But it is no answer to a covenant for non-repair, or to husbandry covenants, it not appearing that the defendant has given up possession of the whole. *Newton v. Allin*, 1 Q. B. 518.

Evidence on plea traversing the title of the plaintiff.] Where the plaintiff sues as assignee, and the defendant traverses the title as stated, it will be incumbent upon the plaintiff to prove it either by shewing the meane conveyances from the original lessor, or by shewing that the defendant has paid rent to himself, which will be evidence of the plaintiff's title as assignee. *Doe v. Parker*, *Peake Ev.* 283., 5th ed.; see also *Carvick v. Blagrove*, 1 B. & B. 531.

Evidence on plea traversing the assignment, &c. to the defendant.] In covenant charging the defendant as heir, assignee, &c., he may deny the descent or assignment, and it will lie upon the plaintiff to prove that the defendant is heir or assignee as stated. In an action on a covenant in a lease, the allegation that the reversion came to and vested in the defendant by assignment, is proved by shewing that he took as heir; for he is an assignee in law. *Derisley v. Custance*, 4 T. R. 75. If the

plaintiff states the particulars of the defendant's title, instead of alleging generally, that the term vested in him by assignment, and those particulars are traversed, they must be proved as such; *Turner v. Eaves*, 3 B. & P. 461.; but where the allegation is that the term has vested in the defendant by assignment, it will be sufficient for the plaintiff, *provida facit*, to show that the defendant has paid rent, or is in possession of the premises. 2 Paul. Ex. 125. *Payne, Ex. 204*, 5 Ed. 2d. Thus, where A. had been tenant of certain premises, and upon his leaving them, B. had taken possession, it was held, in the absence of any evidence to the contrary, that it might be presumed he came in as assignee of A. although he had never paid rent. *Doe v. Williams*, 6 B. & C. 41. Where the defendant has never entered or done any thing to admit the assignment, his title may be proved by producing memorials of the lease conveyances registered by parties under whom the defendant claims, after notice to produce the originals. *Wainston v. Hakerill*, 3 M. & G. 297. In answer to this the defendant may prove that he is in by an under-lease, and not by assignment. *Higford v. Hatch, Doug.* 153.; *Earl of Derby v. Taylor*, 1 East, 502. If he be charged as assignee of all the estate in certain premises, and he is in fact assignee of the estate in part of the premises only, he should, it seems, plead in abatement the non-joinder of the other tenants in common. *Merceron v. Douman*, 5 B. & C. 479. So he may shew that he is only devisee of an equitable estate; *Mavor of Carlisle v. Bismire*, 8 East, 467.; or only appointee, and not liable, as such, on a covenant binding the assigns; not being in by the appointor. *Rosch v. Walsam*, 6 East, 269.

Where a term has been mortgaged, it is not necessary, in an action on a covenant charging the mortgagee as assignee, to prove that he has entered upon the premises; *Williams v. Bosanquet*, 1 B. & B. 238., overruling *Eaton v. Jacques, Doug.* 444.; nor is it necessary, in order to charge an executor as assignee, to prove that he has entered upon the premises; *Wollaston v. Hakerill*, 3 M. & G. 297.; *contra*, 1 Saund. 1. a. (n.); but if he has never entered, he may discharge himself from liability by a plea to that effect. S. C. 321.

In order to charge the assignees of a bankrupt tenant, as assignees of the term, some evidence must be given of an acceptance of the lease by them; for till they manifest their assent to the assignment, the term still remains in the bankrupt. *Copeland v. Stephens*, 1 B. & A. 593.; see 6 G. 4. c. 16. s. 75. Where the assignees of a bankrupt were chosen on the 8th July, and suffered the bankrupt's cows to remain on the premises till the 10th, during which time they were twice milked by order of the assignees, whose servant had received the key of the premises from the messenger, Lord Ellenborough held these circumstances a sufficient acceptance. *Welch v. Myers*, 4 Camp. 368. So where they entered upon, and took possession of, the premises upon which the bankrupt's effects remained, and delivered up the keys immediately after the effects were sold. *Hanson v. Stevenson*, 1 B. & A. 303. So where they put up a lease to sale, and accepted a deposit from the purchaser. *Hastings v. Wilson, Holt, N. P. C.* 290. But the mere fact of putting up a lease to auction, the assignees having never taken possession, and there being no bidder, is not evidence of an acceptance. *Turner v. Richardson*, 7 East, 335. And assignees have a right to do reasonable acts to ascertain the value of the property, *Per* Lord Tenterden C. J. in *Hope v. Booth*, 1 B. & Ad. 505., where *Welch v. Myers*, *supra*, ap-

pears to be questioned. Where an assignee kept the bankrupt upon the premises, carrying on the business for the benefit of the creditors, himself occasionally superintending, but disclaimed the lease by a letter to the landlord, it was nevertheless held to be an acceptance. *Clark v. Hume, R. & M.* 207. But where the assignees allowed the bankrupt's effects to remain on the premises for nearly twelve months, and, in order to prevent a distress, paid arrears of rent, intimating at the same time to the landlord, that they did not intend to take the lease unless it could be advantageously disposed of, and the lease was put up to sale by the assignees, but there were no bidders for it, and the assignees omitted for nearly four months to return the key to the landlord, it was held that there was no evidence of an acceptance. *Wheeler v. Bramah, 3 Camp.* 340. It was held that the provisional assignee under the insolvent acts, 53 G. 3. c. 102., and 1 G. 4. c. 119., could not refuse the assignment of a lease, and must be deemed to have accepted the property. *Crofts v. Pick, 1 Bing.* 354.; *Doe v. Andrews, 4 Bing.* 348. *Best C. J., diss.* But the permanent assignees are not bound to accept it; 7 G. 4. c. 57. s. 93.; and see 1 & 2 Vict. c. 110. s. 37. and 50.

It was held by Lord Tenterden at *nisi prius*, that trustees under an assignment for the benefit of creditors are entitled (like assignees of a bankrupt) to a reasonable time to consider whether they will take to a lease; *Carter v. Warne, M. & M.* 479.; but this doctrine was questioned in *How v. Kennett, 3 A. & E.* 659.; and it should seem that the assignment vests the property in the assignees unless they disclaim before acceptance or entry.

Breach of covenant not to assign, &c.] On a covenant "not to assign, transfer, or set over, or otherwise do, or put away the indenture of demise, or the premises thereby demised, or any part thereof," it has been held that an underlease is no evidence of a breach. *Crusoe v. Bugby, 3 Wils.* 234. But where the proviso was "not to set, let, or assign over the demised premises, or any part thereof," an underlease was considered to be within the terms of the proviso; *Roe v. Harrison, 2 T. R.* 425.; and where a lease contained a proviso for re-entry in case the lessee "should demise, lease, grant, or let the premises, or any part thereof, or convey, alien, assign, or set over the indenture, or his estate therein, or any part thereof, for all or any part of the term," it was held that proof that the lessee had entered into partnership with A., and agreed that he should have the use of a back room and other parts of the premises exclusively, was evidence of a forfeiture. *Roe v. Sales, 1 M. & S.* 297. Taking a lodger is not a breach of a covenant not to underlet the house; *Doe v. Laming, 4 Camp.* 77.; unless there be a distinct agreement for the exclusive occupation of particular rooms. *Greenlade v. Tapscott, 1 C. M. & R.* 59. *post*, p. 398. A compulsory assignment in law is not a breach of a covenant not to assign. Thus the sale of a lease under a *bonâ fide* execution against the lessee, is not a forfeiture of a condition not to assign; but if the tenant gives a warrant of attorney to his creditor for the express purpose of enabling him to take the lease in execution, it will be a fraud and a breach of the condition. *Doe v. Carter, 8 T. R.* 57. 64.; *Doe v. Skeggs, cited 2 T. R.* 134. So an assignment under a commutation of bankrupt is no breach of a covenant not to assign. *Doe v. Bevan, 3 M. & S.* 353.; and see *Doe v. Smith, 5 Taunt.* 795. And

an assignment operating as an act of bankruptcy and being a void deed, will not be a breach of the covenant. *Doe v. Powell*, 5 B. & C. 306. Whether a devise by will is a breach of a covenant not to assign seems to be an unsettled question. *Sheph. Touch.* 144. ; *For v. Swann, Styles*, 482. ; *Crusoe v. Bugby*, 3 Wils. 237. ; *Doe v. Bevan*, 3 M. & S. 361. ; *Doe v. Evans*, 9 A. & E. 719. On a covenant "not to let, assign, transfer, or otherwise part with the premises demised, or the lease," depositing the lease as a security was held to be no breach. *Doe v. Hogg*, 4 D. & R. 225. ; *Doe v. Laming*, R. & M. 36. A lease contained a stipulation that for every acre, and so in proportion for a less quantity of the land which the lessee should "suffer to be occupied" by any other person without the consent of the landlord, an additional rent should be paid. The tenant undertook to "use, occupy," dress, and manure the land according to the custom of the country. The tenant, without the consent of the landlord, suffered other persons to use small portions of the land for the purpose of raising a potato crop ; and it was proved to be the custom of the country for farmers to pursue that course. Held, that the landlord was entitled to the additional rent, this being an *occupation* of the land by other persons. *Greenlade v. Tapscott*, 1 C. M. & R. 55. ; S. C. 4 Tyrw. 566.

To prove the breach of a covenant not to assign or underlet, Lord Alvanley held it to be *prima facie* sufficient to shew that a stranger was in possession of the premises, apparently as tenant, and that on inquiry such stranger said he rented the house. *Doe v. Rickarby*, 5 Esp. 4. But on a covenant, "not to assign, set over, or otherwise let," Lord Ellenborough held that evidence that a stranger was in possession of the premises, and that he said he had taken the premises from another stranger, was not sufficient ; for *non constat* that the party in possession was not a tortious intruder. *Doe v. Payne*, 1 Stark. 86. But see *Doe v. Williams*, 6 B. & C. 41., *supra*, p. 396.

Breach of covenant for good husbandry.] If the breach alleges that the defendant did not use the farm in a husbandlike manner, "but on the contrary committed waste," the plaintiff is bound to prove waste. *Harris v. Mantle*, 3 T. R. 307. See *post*, p. 400. Where the breach is for bad husbandry, and the particulars delivered rely on *non-cultivation*, the plaintiff cannot shew mere *bad* cultivation. *Doe v. Broad*, 2 M. & G. 523. A covenant to spend on the farm all manure collected on it, extends to manure made by the cattle of strangers not fed on the farm, but turned on by a temporary licence. *Hindle v. Pollitt*, 6 M. & W. 529.

Breach of covenant to repair.] A covenant to keep a house in repair is satisfied by keeping it in substantial repair according to the nature of the building ; and with a view to determine the relative sufficiency of the repair, the jury may inquire whether the house was new or old at the time of the demise ; *Stanley v. Tugood*, 3 New Ca. 4. ; accord. *Mantz v. Goring*, 4 New Ca. 451. ; for it is not meant that the house should be delivered up in an improved state, or the consequences of the elements should be averted, but the tenant has the duty of keeping the house in the state in which it was at the time of the demise by the timely expenditure of money and care. *Gutteridge v. Munyard*, 1 M. & Rob. 334. And on an issue as to the amount of damages for not

keeping in repair, the state of the premises when demised is legitimate evidence for the defendant. *Burdett v. Withers*, 7 A. & E. 136. The tenant under such a covenant is liable for repairs only, and not for the extra expence of laying a new floor on an improved plan or the like. *Loward v. Leggatt*, 7 C. & P. 613. But there is a distinction between a covenant to put in repair and to keep in repair; the former covenant is not governed by the state of the premises when demised; the lessee, however, is not bound to substitute new buildings for old. *Belcher v. McIntosh*, 2 M. & Rob. 186.

On a covenant to repair, it is not sufficient evidence to maintain the breach to shew that the house has been thrown down by a tempest, unless the covenantor has not repaired within a reasonable time; *Sheph. Touch.* 173.; and where the covenant is to keep and leave the house in as good a plight as it was in at the time of the making of the lease, it is said that ordinary and natural decay is no breach of the covenant, and that the covenantor is only bound to do his best to keep it in the same plight, and therefore to keep it covered, &c. *Fitz. Ab. Cov.* 4. *Sheph. Touch.* 169.

Where the defendant pleaded that he was always ready to repair, but that the plaintiff sued before a reasonable time had elapsed; to which plaintiff replied *de injuria*, &c.; proof that the defendant absolutely refused to repair entitles the plaintiff to a verdict. *Green v. Eales*, 2 Q. B. 225. In a case in which the damage was alleged to be occasioned by the defendant's neglect to repair, and "from no other cause," it was held sufficient to shew that the premises became insecure by the removal of an adjoining wall by a third party, and that the defendant did not set about the repair in time to prevent the mischief consequent on such removal. *S. C. Ibid.*

Where the covenant is to keep in repair during the continuance of the term, an action for the breach of the covenant may be maintained before the term has expired. *Luxmore v. Robson*, 1 B. & A. 584. Breaking a doorway through the wall of the demised house into an adjoining house, amounts to a breach of a covenant to keep in repair. *Doe v. Jackson*, 2 Stark. 293. A lessee covenanted to repair, uphold, support, sustain, maintain, &c. all and singular the houses and brick walls. Pulling down a brick wall dividing the court-yard in front from another yard at the side, was held a breach of the covenant. *Doe v. Bird*, 6 C. & P. 195. But a mere covenant to repair is not broken by alterations and improvements, where they are evidently contemplated by the lease: as where a private dwelling-house is demised by lease containing a covenant to repair the premises and all such buildings, improvements, and additions as should be made thereupon by the lessee. *Doe v. Jones*, 4 B. & Ad. 126.

Where the plaintiff was obliged to repair in consequence of the defendant's refusal to do so, he cannot recover the expence of finding other premises for use during the repairs. *Green v. Eales*, 2 Q. B. 225. A lessee who underlets with covenants to repair in the same terms as in his own lease, is not necessarily entitled to recover from the under-lessee the costs of an action for non-repair brought against himself; but he may recover the amount of dilapidations recovered against himself and occasioned by the under-lessee's neglect. *Penley v. Watts*, 7 M. & W. 601.; *Walker v. Hatton*, 10 M. & W. 249. And though the covenants of the lessee and under-lessee may be in words the same, they

are in substance different if entered into at different times ; for a covenant to repair is construed with reference to the state of the premises when it begins to operate. *Walker v. Hatton*, *ib.* Nor can the lessee recover from his under-lessee, as special damage, the value of a lease forfeited by non-repair, unless it appears that the forfeiture was solely owing to the under-lessee's non-repair. *Clow v. Brogden*, 2 M. & G. 39.

Breach of covenant for quiet enjoyment.] On a covenant for quiet enjoyment generally, it will not support the breach to shew a *tortious* disturbance by a stranger ; for it is only a covenant against persons having lawful title ; *Dudley v. Folliott*, 3 T. R. 587., 2 Saund. 178. (n) ; but where the covenant is against disturbance by a *particular person*, it is sufficient to shew any disturbance by him, whether by lawful title or otherwise. *Nash v. Palmer*, 5 M. & S. 374. So where the covenant is against disturbance by the lessor, his heirs or executors, it is sufficient to shew any disturbance by him or them. *Forte v. Vine*, 2 Roll. Rep. 21., 2 Saund. 181. a. Where the covenant is for quiet enjoyment against A. and any other person by his means, title, or procurement, it is sufficient proof of the breach to shew an entry by A's wife, in whose name A. purchased jointly with his own. *Builer v. Swinerton*, Palm. 339. So in case of a covenant for quiet enjoyment against all claiming by, from, or under him, a claim of dower by his wife is a breach of the covenant. *Godb.* 333., Palm. 340. So the appointee of A. by virtue of a power in the making of which A. concurred, is a person claiming under him. *Hurd v. Fletcher*, 1 Doug. 43. So where A., seised in fee, settled his estate upon himself for life, remainder to his first and other sons in tail, and made a lease, and covenanted for quiet enjoyment without interruption of the lessor, his heirs or assigns, or any other person claiming any estate, right, or interest, by, from, or under him or any of his ancestors, the eldest son was held to be a person claiming under the lessor. *Evans v. Vaughan*, 4 B. & C. 261. Where the covenant is that the defendant has not done, permitted, or suffered any act, &c., the assenting to an act which the covenantor could not prevent, is not a breach. *Hobson v. Middleton*, 6 B. & C. 295. Merely forbidding the plaintiff's tenant to pay his rent, is not a breach of the covenant for quiet enjoyment. *Witchot v. Lincsey*, 1 Brownl. 81. Where a breach is not assigned in the words of the covenant merely, but goes on to particularise the sort of breach, it must be proved. *Harris v. Mantle*, 3 T. R. 307., also *antè*, p. 396. Thus where the breach of a covenant for enjoyment specifies an entry and expulsion by the defendant, it is not enough for plaintiff to prove a refusal by the defendant to let the plaintiff take possession. *Hawkes v. Orton*, 5 A. & E. 367. But where the first part of the breach contains the gist of the action, the plaintiff need not prove, nor the defendant answer, subsequent matter of aggravation ; thus, where the covenant is to provide a cargo, and the breach is that the defendant did not provide one, but detained the ship, the detention is immaterial. *Deffell v. Brocklebank*, 4 Price, 36.

The plaintiff may assign a breach on the implied covenant contained in the word *demise* ; *Com. Dig. Cov. (A. 4.)*, *Sheph. Touch.* 160. ; but that covenant ceases with the estate out of which the lease is granted ; *Adams v. Gibney*, 6 Bing. 656. ; and is restrained by an express cove-

nant for quiet enjoyment. *Line v. Stephenson*, 4 New Ca. 678. aff. on error, 5 New Ca. 183.; *Stannard v. Forbes*, 6 A. & E. 572.

Plea of Statute of Limitations.] As to the period of limitation in actions of covenant, see statute 3 & 4 W. 4. c. 42. s. 3., *post*, p 402, 403.

DEBT ON BOND.

In an action of debt on bond, the plaintiff, on *non est factum* pleaded, must prove the execution of the bond; and where breaches have been assigned under the statute 8 & 9 W. 3. c. 11. s. 8., he must prove the breaches which the defendant has traversed. By the rules of H. T. 4 W. 4., in debt on specialty, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

The breaches must be proved as in an action of assumpsit or covenant. If they have been suggested on the roll after judgment for the plaintiff on demurrer, it will be necessary to give some evidence that the bond produced, and in which the conditions are contained, is the same as that on which judgment has been obtained; for this purpose it will be sufficient if the attorney for the plaintiff testifies that the bond produced is the instrument delivered to him to bring the action on, and that he knows of no other of the same date; and the attesting witnesses need not be called. *Hodgkinson v. Marsden, Peake, Ev. 287., 5th ed.*; *S. C.*, 2 Camp. 122. Where the defendant on *oyer* set out the bond and condition which was for performance of covenants in an indenture of lease, and pleaded a sham plea, on which there was a replication, demurrer, and judgment for the plaintiff; on the execution of the writ of inquiry, Lord Kenyon ruled that it was not necessary to prove the execution of the lease, as the defendant was estopped by his plea from denying it. *Collins v. Rybot*, 1 Esp. 157. If the defendant lets judgment go by default, and the plaintiff thereupon makes his suggestion of breaches in which he sets out the condition of the bond, and that appears to be for the performance of an award or of articles of agreement or the like, the plaintiff must prove the condition of the bond, the award, indenture, or articles, as well as the breaches suggested. *Edwards v. Stone*, coram Lawrence J., 1 Saund. 58. *e (n)*. But where the breaches are assigned, and not denied, the truth of them is not in issue. When *non est factum* alone is pleaded, and the plaintiff suggests breaches, the defendant cannot shew any thing to excuse performance. *Archbishop of Canterbury v. Robertson*, 1 C. & M. 690.

On *non est factum* pleaded to a bond conditioned for performance of covenants where breaches were assigned in the declaration, it was held that the jury who tried the issue might assess the damages on the *venire* to try the issue, without any award of a *venire* to assess the damages. *Quin v. King*, 1 M. & W. 42.

Defence.

Alteration of the bond.] An alteration of the bond, which avoids it, may be given in evidence on *non est factum*, if it occasions a variance or requires a fresh stamp. But if the alteration is one, whether made by consent or otherwise, which discharges and varies the liability of the parties to the bond, then it is matter which must be specially pleaded. See *Harden v. Clifton*, 1 Q. B. 522.; *Mason v. Bradley*, 11 M. & W. 590.; *Hemming v. Trencery*, 9 A. & E. 926., *antè*, p. 223.

Variance in the defendant's name.] The defendant may be sued by the name in which he executed the bond; but he may also, it seems, be sued by his real name; for where the writ was against W. B., and the declaration called him "W. F. B., sued by the name of W. B.," and the bond was executed by defendant W. F. B. in the name of W. B. by which he was then known, it was held no variance; and it was also held that, if the wrong name had avoided the bond, it should have been specially pleaded. *Williams v. Bryant*, 5 M. & W. 447.

Payment.] Payment before the day fixed for it, is evidence of a plea of payment *at the day*. B. N. P. 174. Though the statute of limitations, 21 Jac. 1. c. 16., did not apply to specialties, yet the defendant might, if the deed was upwards of twenty years old, and there had been no payment or acknowledgment of his liability within that period, have pleaded *solvit ad diem*, and relied upon the presumption of payment arising from lapse of time. But if there had been any payment of interest or acknowledgment after the day appointed for the payment of the money, though upwards of twenty years had elapsed since the payment or acknowledgment, the defendant could not avail himself of this presumption of payment under the plea of *solvit ad diem*, though he might under the plea of *solvit post diem*. *Moreland v. Bennett*, 1 Stra. 652., B. N. P. 174. See further on presumption of payment, *antè*, p. 20, 21.

Statute of limitations.] By the statute 3 & 4 W. 4. c. 42. s. 3., the period of limitation in actions of debt on specialty, and in other actions, is defined; and by section 3. it is enacted, that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant, or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognizance, within *ten years* after the end of the present session, or within *twenty years* after the cause of such actions or suits, but not after; provided, that nothing herein contained shall extend to any action given by any statute, when the time for bringing such action is or shall be by any statute specially limited.

By section 4., provision is made for persons who are, or shall be, at the time of any such cause of action accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the seas; such persons to be at liberty to bring the same actions, so as they commence the same within such times after their coming to, or being of, full age,

discover, of sound memory, or returned from beyond the seas, as other persons having no such impediment should, according to the provisions of the act, have done; and if any person, against whom there shall be any such cause of action, shall be, at the time of such cause of action accrued, beyond the seas, then a party entitled to any such cause of action shall be at liberty to bring it against such person, within the times before limited after the return of such person from beyond the seas.

Provided always, that, if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such specialty or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall be lawful for the person entitled to such actions to bring his action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid; or in case the person entitled to such action shall, at the time of such acknowledgment, be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making it, beyond the seas, then within twenty years after such disability shall have ceased, or the party shall have returned from beyond the seas, as the case may be; and the plaintiff in any such action may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to the plea of this statute.

Under this act, covenant for rent arrear may be brought within twenty years, and is not confined to six years by 3 & 4 W. 4. c. 27. s. 42. *Paget v. Foley*, 2 New Ca. 679. So debt for arrears of an annuity, secured by bond, is barred after twenty years, and not after six years only. *Sims v. Thomas*, 12 A. & E. 536.

Fraud.] Where the defendant pleaded that the bond was obtained by fraud and covin, it was held at Nisi Prius that it was not competent to the defendant to shew that he executed it with full knowledge of its contents, but in consequence of a previous fraudulent representation of an extrinsic fact. *Mason v. Ditchbourne*, 1 M. & Rob. 460. The Court of Exchequer, however, ordered a new trial, for the purpose of more distinctly raising the question of the admissibility of the evidence, and the evidence was received on the second trial, but a verdict being nevertheless found for the plaintiff, the question was not again raised. 2 C. M. & R. 720. n.; see also *D'Aranda v. Houston*, 6 C. & P. 511. The fraud must be some concealment or deception with reference to the instrument itself, and not mere illegality or false representation as to some extrinsic matter. *Green v. Gosden*, 3 M. & G. 446.; and see the cases cited, *antè*, p. 306. Where a surety, being sued on his bond, pleads that it was procured by the fraud and collusion of the plaintiff and the principal, it is not enough to shew fraud by the principal, unless the plaintiff was a party to it; and if the plaintiff was cognisant of it before the defendant executed the bond, he is a party to it. *Spencer v. Handley*, 4 M. & G. 414.

DEBT ON BAIL BOND.

Where issue is joined on the plea of *compensat ad diem* [or on the plea that the defendant put and perfected special bail], the trial is by the record; *Austen v. Fenton*, 1 Taunt. 23; *Tidd*, 239.; and the plea is proved by the production of the recognizance roll. *Whittle v. Oldaker*, 7 B. & C. 478.

The assignment must be indorsed under the hand and seal of the sheriff or other officer, in the presence of two or more credible witnesses. 4 & 5 Ann, c. 16. s. 20. Where the defendant pleaded that there was not any assignment of the bond by the sheriff or under-sheriff, and it appeared in evidence that the bond had been assigned to the plaintiff in the name of the sheriff, and with the seal of office, by one of the under-sheriff's clerks in his office, Lord Mansfield was of opinion that it was sufficient. *Harris v. Ashley*, 1 Selw. N. P. 554.; accord. (in the case of a replevin bond) *Middleton v. Sandford*, 4 Camp. 36.; but see *contra*, *Kilson v. Fagg*, 1 Stra. 60. The witnesses must be disinterested; thus neither the plaintiff himself, nor the sheriff, nor, as it seems, the under-sheriff, is "credible" within the act. *White v. Barrack*, 1 M. & W. 424. When the action is brought by the assignee of the bond, and the assignment is traversed, it is not necessary to shew that the witnesses subscribed their names in the presence of the officer executing the assignment. *Phillips v. Barlow*, 1 New Ca. 433.

The bail are liable to pay the amount due on the original action and the costs to the extent of the penalty, though beyond the amount sworn to. *Tidd*, 305.

DEBT FOR RENT.

In an action for rent the declaration states a demise at a certain rent, and the accruing of rent during a certain period. Sometimes a lease by indenture is set out.

Some of the proofs applicable to issues which occur in this action will be found under the head of *Covenant, antè*, p. 394.; *Assumpsit for Use and Occupation, antè*, p. 196.; and *Ejectment, post*.

Non dimisit.] Where the demise is denied it may be proved by production and proof of a lease executed by the defendant, just as if the plaintiff had declared on the deed, and the defendant had pleaded *non est factum*. See 1 Wms. Saund. 276., n. (1.). As to what amounts to a demise, see *post*, *Ejectment*. If the plaintiff sues as assignee of the reversion, and the defendant has not paid rent to him, he may also be put to prove his title, as such assignee, by production and proof of the meane assignments, or by shewing that he is heir, &c. *Sands v.*

Ledger, 2 *Ld. Raym.* 792. A variance between the demise stated and that proved will be fatal; but where it was alleged that the plaintiff had demised to the defendant three rooms, and it appeared in evidence that the demise was of three rooms, and the use of the furniture, it was held to be rightly stated according to the legal effect; for the rent could not issue out of the chattels. *Walsh v. Pemberton*, *Selw. N. P.* 583.; *Farewell v. Dickenson*, 6 *B. & C.* 251. If the demise is of a messuage and of licence to sport over a manor, &c., reserving an entire rent, and is not under seal, it is void; the incorporeal right not passing except by deed. *Bird v. Higginson*, 6 *A. & E.* 824.

A variance in the statement of the rent will be fatal; as where in the declaration it was stated to be 15*l.* per annum, and it appeared in evidence to be 15*l.* and three fowls. *Sands v. Ledger*, 2 *Ld. Raym.* 793. So where it was stated that the plaintiff demised "yielding and paying the yearly rent of 160*l.* by two even," &c., and the lease in fact was "yielding and paying during the said term, except as hereafter mentioned," and there was a subsequent clause for the reduction of the rent in a certain case which had not however occurred, this was held a fatal variance. *Vavasour v. Ormrod*, 6 *B. & C.* 430.

Nothing in arrear.] The plea of *nil debet* is no longer applicable to this action; see New Rules, *post*, *Appendix*; but every allegation must be specifically traversed, or confessed and avoided.

As to proof of payment, see *anté*, p. 20. and p. 322. The defendant may shew payment to the plaintiff, or to another by his appointment; *Taylor v. Beal*, *Cro. Eliz.* 222., *Gilb. Ev.* 283.; or that the plaintiff has agreed that a debt due by him to the defendant shall go in satisfaction of the rent; *Gilb. on Debt*, 443.; but not that the plaintiff was bound by covenant to repair the premises, and that he (the defendant) expended the rent in necessary reparations. *Taylor v. Beal*, *Cro. Eliz.* 222.; *B. N. P.* 177. But if the lessor directs the lessee to repair, and the lessee repairs accordingly, the money so laid out is evidence of payment. *Gilb. on Debt*, 442. It seems that a compulsory payment of a charge upon the land may be recouped by the defendant out of his rent, and is evidence under a plea of *riens in arrere*. *Dyer v. Bowley*, 2 *Bing.* 94., and cases cited *post*, *tit. Replevin: Plea, riens in arrere*.

Statute of Limitations.] Where the demise is by indenture the statute of Limitations, 21 *Jac.* 1. c. 16. did not apply; but the action is now limited by 3 & 4 *W. 4.* c. 42. s. 3. (cited *anté*, p. 402, 403.) to twenty years and not by 3 & 4 *W. 4.* c. 27. s. 42. to six years. *Paget v. Foley*, 2 *New Ca.* 679.; *Sims v. Thomas*, 12 *A. & E.* 536.; *Grant v. Ellis*, 9 *M. & W.* 113. The plea must be a special one.

DEBT FOR DOUBLE VALUE.

In an action of debt for double value, the plaintiff must prove the demise or tenancy; the determination of the term; the holding over; the demand and notice in writing given to the defendant, and the amount of the double value claimed; or such of those facts as are denied by the pleadings.

By statute 4 Geo. 2. c. 28. s. 1., in case any tenant or tenants for life, lives, or years, or other persons who shall come into possession of any lands, tenements, or hereditaments, by, from, or under, or by collusion with such tenant or tenants, shall wilfully hold over any lands, &c. after the determination of their term, and after demand made and notice in writing given for delivering the possession thereof, by his or their landlord or lessor, or the person or persons to whom the remainder or the reversion of such lands, &c. shall belong, his or their agents thereunto lawfully authorised, such persons so holding over shall, for and during the time he or they shall so hold over, or keep the person or persons entitled out of the possession of the said lands, &c., pay to the person or persons so kept out of possession, their executors, administrators, or assigns, at the rate of double the yearly value of the said lands, &c. for so long time as the same are detained.

Proof of the demise.] Tenants in common cannot sue jointly in this action, where there has been no joint demise by them. *Wilkinson v. Hall*, 1 New Ca. 713.

Proof of the determination of the term, and of the demand.] In general, the determination of the term will be proved by evidence of the service of a notice to quit upon the defendant; and if such notice be proved, it will not be necessary to shew a demand; for the notice includes a demand. *Wilkinson v. Colley*, 5 Burr. 2694. As to secondary proof of the demand, see *Poole v. Warren*, 8 A. & E. 582., cited *antè*, p. 94, 95. A notice to quit, containing a threat of requiring double rent on refusal, is sufficient. *S. C.*, *ibid.* 585. The notice must be in writing. Where the defendant has held over after the determination of a term certain, a demand of the possession must be proved; but it need not appear that the demand was made on or before the expiration of the tenancy; *Cobb v. Stokes*, 8 East, 361.; though the plaintiff will only be entitled to the double value from the time of the demand made. And where the rent is reserved quarterly, and the demand is made in the middle of a quarter, the plaintiff cannot recover the single rent for the antecedent fraction of the quarter. *S. C.*, *ibid.* Where the notice was served upon the tenant, a feme sole, who married before the expiration of the year, it was held that the landlord might maintain debt against the husband, without making a demand of the possession from him; and that in such action it was not necessary to join the wife for conformity. *Lake v. Smith*, 1 New Rep. 174. A person, appointed by the Court of Chancery to receive the rents and profits of the estate, is a sufficient agent within

the statute to make the demand in his own name. *Wilkinson v. Colley*, 5 Burr. 2694. Where a trustee joined with the cestui que trust in a mortgage to the plaintiff, and all parties joined in appointing G. to be the agent and attorney of the cestui que trust to demand and collect rent, to give notices to quit, &c., and to do every thing that cestui que trust could have done before the mortgage, it was held that G. was authorized to demand within the statute. *Poole v. Warren*, 8 A. & E. 562.

The value.] In estimating the value, only the land and its real easements and appurtenances can be included. Thus where the owner of a mill let part of it to the defendant, with the use of the revolving shaft of a steam-engine which passed through the part demised, at an entire rent, the value of the power must be excluded. *Robinson v. Learoyd*, 7 M. & W. 48.

Defence.

Though special traverses have been usual in this action, it should seem that the general issue *nil debet*, or, perhaps, Not guilty, is still sufficient to put the plaintiff on proof of the whole declaration. See *Jones v. Williams*, 4 M. & W. 375., decided on 11 Geo. 2. c. 19. s. 4. for double value of goods removed to avoid a distress.

The defendant may shew that the plaintiff has waived the notice to quit and demand of possession; and, where the plaintiff has accepted rent from the defendant after the expiration of the notice to quit, it is a question for the jury whether such rent was received in part satisfaction of the double value, or as a waiver of it. *Ryall v. Rich*, 10 East, 52. And where the landlord declared in debt, first for the double value, and secondly for use and occupation, and the tenant pleaded *nil debet* to the first count, and a tender of the single rent, before action brought, to the second, and paid the money into court, which the plaintiff took out of court, and proceeded, it was held that this was no waiver of the plaintiff's right to the double value, so as to be ground of nonsuit; but that it was a case to go to the jury; and that the plaintiff going on with the action after taking the single rent out of court was evidence to shew that he did not mean to waive his claim for the double value, but to take the single rent *pro tanto*. *S. C. Ibid.* A recovery in ejectment is no waiver of the landlord's right to the double value for the time between the expiration of the notice to quit, and the time of recovering possession under the ejectment. *Soulsby v. Neving*, 9 East, 310. A tenant, who holds over under a fair claim of right, will not be considered as wilfully holding over within the statute, though it appear eventually that he had no right. *Wright v. Smith*, 5 Esp. 203. Where the action is against co-tenants, a statement by one, on receipt of notice to quit, that "he has nothing to do with the land," is not evidence in his favour to shew that his holding was not wilful; but if one offers to give up the land, and the other alone holds out, it is doubtful whether the action will lie against both. *Hirst v. Horn*, 6 M. & W. 393.

DEBT FOR DOUBLE RENT.

By stat. 11 Geo. 2. c. 19. s. 18., if any tenant shall give notice of his intention to quit the premises holden by him at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, then such tenant, his executors or administrators, shall thenceforward pay to the landlord double the rent or sum which he should otherwise have paid, to be levied, sued for, and recovered at the times and in the same manner as the single rent or sum, before the giving of such notice, could be levied, &c. ; and such double rent or sum shall continue to be paid during the time such tenant shall continue in possession.

The notice mentioned in this statute need not be in writing; *Tymms v. Rowlison*, 3 Burr. 1603. ; but it must give a fixed time for quitting; thus a notice to quit, "as soon as the tenant can get another situation," does not render him liable on this statute, though he has got another situation. *Farrance v. Elkington*, 2 Camp. 591. The statute only applies to those cases in which the tenant has the power of determining his tenancy by a notice, and where he actually gives a valid notice sufficient to determine it. *Johnstone v. Hudlestone*, 4 B. & C. 922.

DEBT FOR PENALTIES.

In an action of debt on a penal statute, the general evidence for the plaintiff is, proof of the commission of the act upon which the penalty has accrued, and, if a time be limited by the statute for bringing the action, that the action was brought within that time; and, where the venue is local, that the action is brought in the right county.

In the statement of the offence it is frequently necessary to allege a contract, and such contract must be proved as laid. Thus in an action of debt for selling coals by an illegal measure, where it was stated that the coals were sold by the defendant to A., and it was proved that they were sold to A. and B., Lord Ellenborough held the variance fatal. *Parish v. Burwood*, 5 Esp. 33. ; *Everett v. Tindall*, 5 Esp. 169. So where, in an action on the lottery acts, the declaration stated that the defendant insured one number for 43*l.* 2*s.*, and it appeared in evidence that several numbers had been insured for that sum. *Phillips v. Da Costa*, 1 Esp. 59. So in a declaration for usury, a variance in the day of lending, though laid under a *videlicet*, is fatal. *Partridge v. Coates*, R & M. 153. ; *Fox v. Keeling*, 2 A. & E. 670. But in a penal action for exercising a trade without having served an apprenticeship, the plaintiff is not obliged to prove that the defendant used the trade all the time laid in the declaration; it being averred that he forfeited 40*s.* for each month. *Powell v. Farmer*, Peake, 57. Where the penalty

arises from the commission of an act without a legal qualification, the existence of which qualification is peculiarly within the knowledge of the defendant, it will not be necessary for the plaintiff to shew the want of qualification. *Apoth. Co. v. Bentley*, R. & M. 159. In *Hodkinson v. Mayer*, 6 A. & E. 194., it was held that an attorney, who practises in the county court after having omitted for a year to take out his certificate, is not liable to penalties under statute 12 Geo. 2. c. 13. s. 7. as a person practising in the county court without having been legally admitted according to stat. 2 Geo. 2. c. 23. A person, being deputy clerk of peace and acting as attorney, is not liable to penalties under 22 Geo. 2. c. 46., if he abstains from the actual exercise of the office. *Faulkner v. Chevell*, 10 A. & E. 76.

Evidence of commencement of the action.] Since the uniformity of process act the writ is, in all cases, the commencement of the action, and the record will shew the day on which it issued. The return of the writ need not be shewn; *Parsons v. King*, 7 T. R. 6.

By 2 W. 4. c. 39., no first writ is available to prevent the operation of any statute limiting the commencement of an action, unless the defendant has been arrested on it, or served with it, or proceedings towards outlawry have been had thereupon, or unless the writ and all others issued in continuation of it shall be returned *non est inventus* and entered of record within a calendar month after the expiration of it including the day of expiration, and unless every such writ be issued within one calendar month after the expiration of the preceding writ, and contain a memorandum of the day of date and return of the first writ indorsed or subscribed by the sheriff or other officer in the case of bailable process, and by the plaintiff or his attorney in process not bailable.

By 3 & 4 W. 4. c. 42. s. 3. all actions for penalties or damages given to parties grieved must be brought within two years after the cause of action.

Evidence of locality of the action.] In general in an action upon a penal statute the plaintiff must prove that the cause of action arose in the county in which the venue is laid. See 31 *Eliz. c. 5. s. 2.*; *Tidd*, 431.

The offence of selling coals of a different description from those contracted for, upon statute 3 G. 2. c. 26. s. 4., is complete in the county where the coals are delivered, and not where they were contracted for; the contract not being for any specific parcel of coals, but for a certain quantity of a certain description. *Butterfield v. Windle*, 4 East, 385. In an action on 1 & 2 P. & M. c. 12., for driving a distress out of the hundred into another county, the venue may be laid in either county. *Pope v. Davis*, 2 Taunt. 252. An action for the penalties of usury, on the statute 12 Anne, st. 2. c. 16., can only be brought in the county where the offence is completed; and therefore where the contract is made in one county, and the usurious interest is received in another, the venue must be laid in the latter county. *Pearson v. M'Gowran*, 3 B. & C. 700.

Where the plaintiff had closed his case, but had omitted to prove the offence committed in the proper county, Lord Ellenborough C. J. refused afterwards to allow him to give evidence of it, although in fact he was

prepared to do so. *Tovey v. Palmer, Esp. on Penal Stat.* 142.; but see *Maugham v. Walker, Peake*, 163.

Defence.

The new rules of *H. T. 4 W. 4.*, do not apply to penal actions which are within the 4th sec. of 21 Jac. 1. c. 4.; *Karl Spencer v. Swannell*, 3 *M. & W.* 154.; and that section of 21 Jac. 1. applies to actions on statutes subsequent as well as prior to that act. *Jones v. Williams*, 4 *M. & W.* 375. The plea of Not guilty is therefore proper. *Faulkner v. Chevell*, 5 *A. & E.* 213., 10 *A. & E.* 76. However it is now necessary, pursuant to a rule of court, *T. T. 1 Vict.* to insert the words "by statute" in the margin of the plea whereon the defendant intends to give the special matter in evidence under the general issue by virtue of any act of parliament.

As to the competency of witnesses entitled to share in the penalty, see *antè*, p. 115.

DETINUE.

The declaration states either a bailment for redelivery, or a fictitious loss by the plaintiff and finding by the defendant, as in trover: this inducement is in neither case traversable. It is enough to shew that the plaintiff is entitled to the possession of goods wrongfully withheld by the defendant. *Gledstane v. Hewitt*, 1 *C. & J.* 565. And in proof of this he may shew a different bailment from that stated in the count. *S. C. Ib.*

Plea of non detinet.] By rule *H. 4. W. 4.*, this plea operates as a denial of the detention, but not of the plaintiff's property; and no other defence is admissible under it. Any justification of the detention must be pleaded. *Richards v. Frankum*, 6 *M. & W.* 420. It is no defence that the defendant has improperly parted with the property before the demand. *Jones v. Dowle*, 9 *M. & W.* 19.

Plea denying the property of the plaintiff.] On this plea it is no defence that other persons, joint owners with the plaintiff, are not made co-plaintiffs. *Broadbent v. Ledward*, 11 *A. & E.* 209. A lien may be shewn under it. *Lane v. Tewson*, 12 *A. & E.* 116. n. (a); *Dirks v. Richards*, 4 *M. & G.* 574. Plaintiff declared in detinue for cloths: Plea, lien on the cloths for the expense of fulling them: Replication, tender of a reasonable sum, and that no more was due for such fulling: Rejoinder, that more was due for it, and issue thereon. At the trial, plaintiff proved a tender of a sum equal to all that was due for fulling two pieces of cloth which the defendant had detained: Held, that the defendant could not, on this issue, justify detention as a lien in respect of other pieces of cloth which he had taken to full at the same time, but had since returned to the plaintiff,

and in respect of which he also had a lien on the two pieces detained ; for the plea claimed a lien only for fulling the latter pieces, which lien was satisfied. *Coombs v. Noad*, 10 *M. & W.* 127.

Damages.] Where there are separate parcels of goods, the jury ought to find the value of each ; for the defendant may perhaps give up some in specie, and elect to pay damages for the rest. *Pawly v. Holly*, 2 *W. Bl.* 853. ; *Sandford v. Alcock*, 10 *M. & W.* 689.

EJECTMENT.

General Evidence of the Plaintiff.

The lessor of the plaintiff in ejectment must in general prove a legal title in the premises in himself, at the time of the demise in the declaration, sufficient to enable him then to enter upon them and to make such a demise. The lease, the entry of the plaintiff, the ouster by defendant, and the possession of the premises by the defendant or tenant when served with the declaration, are all admitted by the common consent rule.

He is not bound, as part of his case, to produce the rule to confess lease, entry, and ouster. *Doe v. Raby*, 2 *B. & Ad.* 948., overruling *Doe v. Lamble*, *M. & M.* 237. The only instance in which it can now be necessary to produce the rule is where, the plaintiff applying his case to certain premises, the other party contends that he does not defend for those. There it may be requisite to produce the rule to shew for what he does defend. *Per Lord Tenterden C. J., Doe v. Raby*, 2 *B. & Ad.* 949. Accord. *Doe v. Armfield*, 1 *Dowl. N. S.* 327.

Proof of a sufficient title.] The plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's. *Martin v. Strachan*, 5 *T. R.* 107 (n). A title gained by the statute of limitations has been held sufficient in ejectment. *Stocker v. Berny*, 1 *Ld. Raym.* 741. ; *Cholmondeley v. Clinton*, 2 *J. & W.* 156. ; *Taylor v. Horde*, 1 *Burr.* 119. And now the late act 3 & 4 *W. 4. c. 27. s. 34.* expressly extinguishes all right and title of the party out of possession. But it seems that mere possession of itself constitutes no sufficient title even as against a wrong-doer ; and in this respect ejectment differs from trespass. See *Doe v. Billyard*, 3 *M. & R.* 112., and *note ib.* ; *Holroyd J., in Harper v. Charlesworth*, 4 *B & C.* 592. ; *contra, Allen v. Rivington*, 2 *Saund.* 111. But priority of possession is evidence of title as against a wrong-doer ; and where the defendant forcibly expelled the plaintiff who had been in possession for a year as tenant, Lord Tenterden C. J. ruled this to be sufficient proof of title as against the defendant, who shewed none. *Doe v. Dycball*, *M. & M.* 346. So where the defendant obtained possession by the licence of the plaintiff and then excluded him, plaintiff may recover without further proof of title. *Doe v. Baylup*, 3 *A. & E.* 188. Where the plaintiff proved twenty years' possession, and the defendant

proved that he had been subsequently in possession for less than twenty, it was held that the plaintiff was entitled to recover. *Doe v. Cooke*, 7 Bing. 346. See *Brest v. Lever*, 7 M. & W. 593. It is no answer to an ejectment founded on twenty years' adverse possession, that such possession was in continuation of that of a sister who entered by abatement into the land to which her elder brother (whose issue was alive) was entitled as heir, and who died more than twenty years before the ejectment was brought. *Doe v. Lawley*, 3 Nev. & M. 331. The lessee for years of a copyholder may recover as against any one but the lord without proof of a custom or licence to demise for years. *Doe v. Tresidder*, 1 Q. B. 416.

A tenant who has come in under, or paid rent to, his landlord, cannot dispute his title; see *post*, "*Ejectment by Landlord*;" and a party may be estopped from disputing the title of another in this action by referring the question of right to an arbitrator, who awards in favour of the lessor of the plaintiff. *Doe v. Rosser*, 3 East, 15.; *anté*, p. 152.; *Hunter v. Rice*, 15 East, 100. So where the question of tenancy and rent were submitted to the Master of the Rolls by an amicable suit, the tenant cannot dispute the plaintiff's title to rent after acquiescence in the decree of the Master against him. *Allason v. Stark*, 9 A. & E. 255.

The lessor of the plaintiff must also shew that he had a right of entry at the time of the demise; for if his entry is barred by the statute of limitations or otherwise, he cannot recover in this action. If his title to enter, therefore, has accrued more than twenty years before the bringing of the action, he must be prepared to shew himself within some of the exceptions in the statute; see the statute, *post*, *tit. "Defence."* If the lessor of the plaintiff had a right of entry at the time of the demise laid it will be sufficient, though the right be divested before trial; for the plaintiff has a right to proceed and recover damages for the trespass, though he cannot have a writ of possession. *Co. Litt.* 285. a; *Doe v. Bluck*, 3 Camp. 447.

It must be proved that the lessor of the plaintiff had a sufficient title at the time of the demise laid in the declaration. *B. N. P.* 105. An heir at law may lay the demise on the day on which his ancestor died. *Roe v. Hervey*, 3 Wils. 274. And a posthumous son, taking lands by way of remainder under statute 10 & 11 W. 3. c. 16., may lay the demise on the day of his father's death. *B. N. P.* 105. Where a person comes lawfully into possession, as under a negotiation for a purchase or a lease, ejectment cannot be maintained until such possession has been determined by demand or otherwise; and therefore the demise must appear to be after the demand. *Right v. Beard*, 13 East, 210. So where there has been a tenancy at will, the demise cannot be laid on a day antecedent to the determination of the will. *Goodtitle v. Herbert*, 4 T. R. 680. But in ejectment by a mortgagee against a mortgagor in possession, the demise may be laid on a day anterior to the actual determination of the will. *Per Buller J. Birch v. Wright*, 1 T. R. 383. See *post*, "*Ejectment by Mortgagee.*" If a clause is inserted in the mortgage deed that the mortgagor shall continue in possession until default made in payment, the demise must be laid on a day subsequent to the time of payment. *Wilkinson v. Hall*, 3 New Ca. 508. In ejectment by assignees, a demise after the act of bankruptcy, and before the assignment, was held bad. *Doe v. Mitchell*, 2 M. & S. 446. Where

the demise was laid on 3d October, without any year, it was held enough to prove a title on *any* 3d October, and that no amendment could be made, or was necessary, at *Nisi Prius*. *Doe v. Heather*, 8 *M. & W.* 158.

The demise must be framed according to its legal effect and the interest of the lessor of the plaintiff; therefore a joint demise by two persons is not supported by proving that they are entitled as tenant for life and remainderman; for the lease of the latter operates as a confirmation, not as a lease. *Treport's case*, 6 *Rep.* 14, *b.*; and see *Doe v. Adams*, 2 *C. & J.* 232. Joint tenants and coparceners may either join or sever in the demise. Upon a several demise from each, the portion belonging to each may be recovered; and if several joint tenants or coparceners join and declare on the separate demises of each, the whole may be recovered. *Doe v. Read*, 12 *East*, 57.; *Doe v. Fenn*, 3 *Camp.* 190. The payment of an entire rent to the common agent of the lessors of the plaintiff is *prima facie* evidence of their joint title. *Doe v. Grant*, 12 *East*, 221. Tenants in common must make several demises in ejectment; *Doe v. Errington*, 1 *A. & E.* 750.; and Taunton J. refused to amend at *Nisi Prius* either by inserting distinct demises, or striking out the name of one of the lessors, where the amendment affected the merits. *S. C.* So where the demise is joint by parceners, and the title of one is barred by fine and nonclaim, there can be no verdict for the other. *Doe v. Pett*, 11 *A. & E.* 842. Where a corporation sues in ejectment, the demise is stated to be by deed; but no deed need be proved; *Furley v. Wood*, 1 *Esp.* 198.; for the lease is admitted by the consent rule.

Plaintiff must shew a legal title.] The plaintiff must prove a legal title; an equitable title is not sufficient. *Roe v. Reade*, 8 *T. R.* 118. 123.; *Doe v. Wrooth*, 5 *East*, 138. The assignee of a copyhold by a common law conveyance without surrender cannot sue even the widow of the assignor. *Doe v. Webber*, 3 *New Ca.* 922.

With regard to devises in trust, the rule is that where something is to be done by the trustees which makes it necessary for them to have the legal estate, such as the payment of the rents and profits to another's separate use, or of the debts of the testator, or to pay rates and taxes and keep the premises in repair, or the like, the legal estate is vested in them, and the grantee or devisee has only a trust estate. See the note to *Jeffreson v. Morton*, 2 *Saund.* 11. *b.* (n), and the cases there collected. So it is said by Mr. Justice Bayley, *Houston v. Hughes*, 6 *B. & C.* 421., that where an estate is given to trustees and their heirs indefinitely, the trustees will take the fee, if the purposes of the trust require that they should have the absolute property in them, or that they should take it for an indefinite period of time, unless a contrary intent is manifested on the face of the will. The same rule of construction is adopted in cases of deeds in trust to sell. *Doe v. Dear-don*, 8 *East*, 248. But a mere charge for the payment of debts will not give the trustees the legal estate, unless the testator intends that they shall be active in paying the debts. *Kenrick v. Beauchlerck*, 3 *B. & P.* 175. A trust to receive the rents and profits, and pay them over, vests the legal estate in the trustee; a trust to permit and suffer the cestui que trusts to receive the rents and profits, vests it in the cestui que trust. *Broughton v. Langley*, 1 *Lutw.* 814. 823.; *Doe v.*

Howfray 6 A. & E. 207.; *Fletcher, on the Legal Estate of Trustees*, p. 30. A devise to trustees in trust to pay to or permit and suffer to receive, gives the legal estate to cestui que trust; because, being inconsistent, the last words shall prevail in a will. *Doe v. Biggs*, 2 Tunt. 109. Yet where the trustees under such a devise were to repair, to let, &c., it was held they took the legal estate; *White v. Parker*, 1 New Ca. 573.; and where the trust, as to three undivided parts out of four, required the legal estate to be in the trustees, it was held to vest in them as to all. *S. C. ib.* Where an estate is devised to trustees for particular purposes, the legal estate is vested in them as long as the execution of the trust requires it, and no longer; and as soon as the trusts are satisfied, it will vest in the person beneficially entitled. Per Bayley J., *Doe v. Nicholls*, 1 B. & C. 342.; and see *Doe v. Simpson*, 5 East, 171.; *Fletcher, on the Legal Estate of Trustees*, p. 50.

Proof of legal title — Presumption of surrender.] In certain cases where the legal estate has been vested in a trustee, and there is no direct evidence of a conveyance or surrender to the cestui que trust, a jury may presume such conveyance or surrender. *Lade v. Holford*, B. N. P. 110.; *Goodtitle v. Jones*, 7 T. R. 45. Thus where an estate is directed to be conveyed, a jury may, within four years from the time when the estate was directed to be conveyed, presume that it has been so conveyed by the trustees. *Doe v. Slade*, 4 T. R. 682. So where it is for the interest of the owner of the inheritance that a satisfied term should be considered as surrendered, and it appears that no beneficial purpose can be answered by the continuance of the term, a surrender may be presumed. *Doe v. Wrighte*, 2 B. & A. 720. Thus a term of 1000 years was created by deed in 1717, and in 1735 was assigned for the purpose of securing an annuity to A., and, after that, to attend the inheritance; A. having died in 1741, and the estate having remained undisturbed in the hands of the owner of the inheritance and his devisee from 1735 to 1813 without any notice having been in the mean time taken of the term, except that in 1801 the devisee, in whose possession the deeds creating and assigning it were found, covenanted to produce those deeds when called for, it was held that under these circumstances the jury were warranted, on ejectment brought by the heir at law, in presuming a surrender of the term. *S. C. Ibid.* Again in the case of a satisfied term, where acts are done or omitted by the owner of the inheritance and persons dealing with him as to the land, which ought not reasonably to be done or omitted if the term existed in the hands of the trustee, and there does not appear to be any thing to prevent a surrender from having been made, those acts have been considered evidence from which a jury may presume such surrender. *Doe v. Hilder*, 2 B. & A. 791. But in *Doe v. Plowman*, 2 B. & Ad. 573., and in *Aspinal v. Kempson*, Sugd. V. & P. 446. (8th ed.) cor. Lord Eldon C., the doctrine held in the above cases was questioned, and the circumstances were considered insufficient to found a presumption of the surrender of a term attendant.

Where a term of years becomes attendant upon the inheritance either by operation of law, or by a special declaration, upon the extinction of the objects for which it was created, the enjoyment of the land by the owner of the reversion (thus become the cestui que trust of the term) may be accounted for by the union of the two characters of cestui que

trust and inheritor; and there appears therefore to exist no circumstance from which a jury can imply a surrender. *Doe v. Hilder*, 2 B. & A. 791.; *Townsend v. Champenown*, 1 Y. & J. 544. The mere fact of a term being satisfied furnishes no ground from which the jury can presume it surrendered. *Evans v. Bicknell*, 6 Ves. 185. There ought to be some dealing with the term to authorise such a presumption. *Ibid.*; *Cholmondeley v. Clinton*, cited *Sugd. V. & P.* 426.; *Doe v. Williams*, 2 M. & W. 749. Where a term has been expressly assigned to attend the inheritance, and there has been no act or omission inconsistent with the existence of the term, there is less ground to presume a surrender from the mere lapse of time and silence of the party who possesses the inheritance. See *Sugd. V. & P.* 389. 391.; *Doe v. Plowman*, 2 B. & Ad. 573. So the recognition of the term as subsisting at a late period, (*Doe v. Scott*, 11 East, 478.); the fact that it would have been contrary to the duty of the trustees to surrender the estate, (*Keene v. Deardon*, 8 East, 267.); or that the original enjoyment of the party who sets up the presumed conveyance was consistent with the fact of there having been no conveyance, (*Doe v. Reed*, 5 B. & A. 237.); are all circumstances from which a jury may infer that no conveyance has taken place. Where A. devised an estate to trustees for years with remainder to B., and B., eighteen years after the death of A., treated the estate as his freehold and leased it for lives, it was held that the jury ought not to presume a surrender of the term; and per Bayley B. "Is there any case where a surrender has been presumed within twenty years? I do not think that a jury ought to be required to presume what they do not believe. In the present case, if a surrender had really taken place, it must have been known to many individuals." *Day v. Williams*, 2 C. & J. 460. "No case can be put in which any presumption has been made, except where a title has been shewn by the party who calls for the presumption, good in substance, but wanting some collateral matter necessary to make it complete in point of form." Per Tindal C.J., *Doe v. Cooke*, 6 Bing. 179.

Proof of legal title — answer by the defendant.] The defendant may, in some cases, disprove the legal title of the party through whom both he and the lessor of the plaintiff claim. Thus, where the lessor claims under a lease from A. B. in 1818, and the defendant under a conveyance from A. B. in 1824, the defendant may shew that, in 1818, A. B. had no power to make such lease. *Doe v. Powell*, 1 A. & E. 531. But where A., without title, entered upon land and built a cottage, and afterwards accepted a lease by indenture from B.; and defendant, claiming the land as his own, paid A. 20*l.* to give up possession to him; it was held, in ejectment on the demise of B., that A. had estopped himself from controverting the title of B., and that the defendant was bound by the estoppel, having come in under, and received possession from, B. *Doe v. Mills*, 2 A. & E. 17. So, where the defendant fraudulently got possession by obtaining the licence of the occupier, and then set up an adverse title, held, that the occupier might eject him without proof of title. *Doe v. Baytup*, 3 A. & E. 188. The defendant, as already stated, (*ante*, p. 201., 412.), may shew that the title of the lessor of the plaintiff has expired. Thus, in ejectment for a forfeiture, he may shew that his lessor has conveyed away all his legal estate by way of mortgage, though the mortgagee has never enforced his rights. *Doe v. Ed-*

wards, 5 B. & A. 1065. As to the estoppel between landlord and tenant, see post, "*Ejectment by Landlord.*"

Entry to avoid a fine levied with proclamations.] It was formerly necessary to prove an actual entry before action brought, where an estate was divested by a fine levied with proclamations; and the ejectment must have been brought within a year after entry; but fines and recoveries having been abolished by 3 & 4 W. 4. c. 74., the cases under this head have been omitted. Where a termor makes a feoffment, and levies a fine with proclamations, and thereby incurs a forfeiture, yet the term may, until entry, be treated as subsisting, so as to enable his executor to recover in ejectment. *Doe v. Pett*, 11 A. & E. 842.

Actual ouster, co-tenants.] The ouster, as well as the lease and entry, is in general confessed by the consent rule; but where the action is brought by one joint-tenant, parcener, or tenant in common against his companion, the court will allow the defendant to enter into a special rule confessing the lease and entry, and also the ouster "if an actual ouster of the plaintiff's lessor by the defendant shall be proved at the trial, but not otherwise."

Where a tenant in common had been in the sole and uninterrupted possession for thirty-six years without account to, or demand by, his companion, this was held to be ground for a jury to presume an ouster. *Doe v. Prosser*, Cowp. 217. So if one tenant in possession claims the whole and denies possession to the other, this, being beyond the mere act of receiving the whole rent, is evidence of an ouster. *Doe v. Bird*, 11 East, 49. So where three of four co-tenants authorised a company to use the land for a railroad, it was held that such an occupation amounted to an ouster. *Doe v. Horn*, 5 M. & W. 564. Before the statute 3 & 4 W. 4. c. 27., it was held that a bare perception of the profits by one tenant in common, for twenty-six years, was no ouster. *Fairclain v. Shackleton*, 5 Burr. 2604. And where one tenant in common levied a fine and took the rents and profits afterwards without account for nearly five years, it was held that there was no evidence from which a jury could presume (contrary to the justice of the case) an ouster of the other tenant. *Peaceable v. Read*, 1 East, 568.

By 3 & 4 W. 4. c. 27. (for limitation of actions), s. 12., it is enacted, that where any one or more of several persons entitled to any land, or rent, as coparceners, joint-tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share of such land or of the profits, or of such rent, for his or their own benefit, or for the benefit of any person, other than the person entitled to the other share of the same land or rent, such possession or receipt shall not be deemed the possession or receipt of or by such last-mentioned person or persons or any of them.

It has been thought that, by reason of this provision, ejectment will now lie by one co-tenant against another who is in possession of the whole, without proof of an actual ouster, and that the defendant ought no longer to be permitted to enter into a special consent rule; but it seems that the former practice in this respect continues. *Per Littledale J.*, *Bail Court*, M. T. 1838; and see *Doe v. Horn*, 3 M. & W. 333.

If a special consent rule has not been entered into, the common

consent rule will be evidence of an actual ouster, so as to enable the joint-tenant to recover. *Oates v. Brydon*, 3 Burr. 1895.; *Doe v. Cuff* 1 Camp. 173.

The local situation of the premises.] A variance in the local situation of the premises is fatal, unless amended. *Goodtitle v. Lamniman*, 2 Camp. 274. Where they were described as lying in the parish of Farnham, and proved to be in the parish of Farnham Royal, it was held to be no variance. *Doe v. Salter*, 13 East, 9. And where they were described as situate in the parish of Westbury, and it was proved that there were two parishes of Westbury, viz. Westbury on Trym, and Westbury on Severn, this was held no variance. *Doe v. Harris*, 5 M. & S. 326. Where the premises were described as situate in the parish of A. and B., and at the trial it appeared that some of the lands lay in the parish of A. and some in the parish of B., and that there was no parish of A. and B., and the plaintiff had a verdict, the court refused a rule for a new trial. *Goodtitle v. Walter*, 4 Taunt. 671. In a similar case, however, Parke B. held it a variance, but permitted an amendment; *Doe v. Edwards*, 1 M. & Rob. 319.; and this was approved of by the court in *Doe v. Leach*, 3 M. & G. 229. If the word *parishes* had been used, the allegation would have been divisible. *S. C. ib.* If the premises are described to be in *St. Mary, Lambeth*, and by the evidence appear to be in Lambeth, it not being proved that these are distinct parishes, it seems to be no variance. *R. v. Glossop*, 4 B. & A. 619.; *Kirtland v. Pounsett*, 1 Taunt. 570. So where the premises were laid to be in the parish of St. Luke in the county of Middlesex, and it appeared that there were two parishes of St. Luke in that county, the one St. Luke *Chelsea*, and the other, St. Luke *Old Street*, usually called St. Luke, Middlesex (where the premises in fact were), the description was held sufficient. *Doe v. Carter*, 1 Y. & J. 492.

The power of amendment at *Nisi Prius* has rendered a variance of little moment where the merits are not affected by it; see *antè*, p. 67.; and this power may be exercised by amending the day of the demise alleged in the declaration. *Doe v. Leach*, 3 M. & G. 229.

Ejectment by Landlord.

In ejectment by a landlord, the lessor of the plaintiff must prove the demise and its expiration, either by efflux of time, notice to quit, disclaimer or forfeiture.

If a demise from the lessor of the plaintiff to the defendant be proved, no other evidence of title need be given, as the tenant cannot dispute the title of his landlord; *Doe v. Samuel*, 5 Esp. 174.; *Gravenor v. Woodhouse*, 1 Bing. 43.; or of his assignee; *Gouldsworth v. Knights*, 11 M. & W. 337. So in ejectment by the reversioner after an estate for life, the tenant who has paid rent to the tenant for life cannot dispute the title of the reversioner. *Doe v. Whitroe*, D. & R. N. P. C. 1. And a person claiming under, or who has received possession by, the voluntary act of the tenant, is equally estopped. *Doe v. Mills*, 2 A. & E. 17., cited fully *antè*, p. 415.

A mere licensee is on the same footing as a tenant; therefore where

a party fraudulently obtained leave to enter from a servant of the lessor of the plaintiff, and then set up a title to the premises, it was held that he could not defend an ejectment, but was bound to deliver up possession before he disputed the title. *Doe v. Bagtup*, 3 A. & E. 188. Where A. conveyed lands in fee with an agreement that he was to remain in possession during his life; held, that A.'s widow could not defend her possession in an ejectment at the suit of the alienee by setting up the title of a party to whom her husband had previously mortgaged the land. *Doe v. Skirrow*, 7 A. & E. 157. A person admitted to defend as landlord is bound by the tenant's estoppel. *Doe v. Mueson*, 2 M. & Rob. 56. Even a servant rightfully in possession may eject a person, who claims under him, without any proof of title in himself; nor can the defendant set up any title against his devisee. *Semb.* *Doe v. Birchmore*, 9 A. & E. 662. But a lessee may shew that his lessor was mortgagor in possession when he made the lease, and that the mortgagee has since treated the mortgagor as a trespasser, and demanded rent of the defendant. *Doe v. Barton*, 11 A. & E. 307. A payment of rent under error is no estoppel. *S. C. ib.* See further, *anté*, p. 196, 197., and *post tit. Replevin; Plea, non tenet.*

Proof of the tenancy.] If the demise is by deed or in writing, it must be proved (unless admitted) by the production of the original, or of a counterpart original. *Roe v. Davis*, 7 East, 363. If in the defendant's possession, notice to produce it should be given. Where the lease is by parol, it may be proved by a person who was present at the making, or by an admission of the defendant. 2 *Phill. Ev.* 221. And though the terms of the lease have been committed to writing *not* signed by the parties, they may still be proved by parol. *R. v. St. Martin's, Leicester*, 2 A. & E. 210.; see also *anté*, pp. 1. 3. And though the terms of such lease are in writing, they may be proved by verbal admissions of the opposite party. *Howard v. Smith*, 3 M. & G. 254.

Proof of tenancy from year to year.] Evidence of a demise from year to year may, in the absence of other proof, be gathered from the payment and receipt of yearly rent. *Doe v. Horn*, 3 M. & W. 339. Thus, if the tenant for life leases and dies, and the remainderman receives rent from the tenant, a tenancy from year to year is created. *Sykes v. —*, cited 1 T. R. 161.; *Bishop v. Howard*, 2 B. & C. 100. Where payment of rent is the only proof of tenancy, defendant may shew that the lessor of the plaintiff received it as agent for another. *Doe v. Francis*, 2 M. & Rob. 57. When the party has been let into possession under a lease void by the statute of Frauds, payment and receipt of rent will be evidence of a tenancy from year to year regulated by the covenants and conditions of the void lease. *Doe v. Bell*, 5 T. R. 471. So where he agrees to hold over after the expiration of a written lease at an advanced rent, he will be presumed to hold upon the terms of the former lease. *Digby v. Atkinson*, 4 Camp. 275.; *Hutton v. Warren*, 1 M. & W. 475. The presumption, however, is one of fact, and not of law; see *Johnson v. St. Peter, Hereford*, 4 A. & E. 520. So where the party is let into possession and pays rent under an agreement for a lease, a tenancy is created on the terms of the lease. *Mann v. Lovejoy*, R. & M. 355.; *Knight v. Bennett*, 3 Bing. 361.; *Doe v. Stratton*, 4 Bing. 446. And where the lease is to contain a clause of re-entry for breach of a husbandry covenant,

the yearly tenancy will be subject to a similar condition. *Doe v. Amey*, 12 A. & E. 476. So also if, being in possession under such an agreement, he acknowledges that half a year's rent is due. *Cox v. Bent*, 5 Bing. 185.; *Regnart v. Porter*, 7 Bing. 451.; *Braythwayte v. Hitchcock*, 10 M. & W. 494. But where a person comes in as under-tenant, and a lease is afterwards granted to the tenant, with the terms of which the under-tenant is unacquainted, the latter, in holding over, is not bound by the terms of the lease. *Torriano v. Young*, 6 C. & P. 8. A general letting at a yearly rent makes a yearly tenancy, though the rent is received at shorter periods, and any quarter's notice to quit is agreed upon. *R. v. Herstmonceaux*, 7 B. & C. 551. But a tenancy determinable at a quarter's notice, without more, is a quarterly tenancy. *Kemp v. Derrett*, 3 Camp. 509. And a general letting without any reservation of annual rent makes a tenancy at will. *Richardson v. Langridge*, 4 Taunt. 128. A yearly tenancy may also be implied from other circumstances besides the payment or admission of rent due. Thus where the tenant of glebe lands remained in possession for eight months after the death of the incumbent, it was held that, after such a lapse of time, it was to be presumed that the new incumbent had assented to the continuance of the tenancy on the same terms as before, and that a notice to quit was necessary. *Doe v. Somerville*, 6 B. & C. 126.

A demise "not for one year only, but from year to year," has been held to constitute a tenancy for two years at least. *Doe v. Cartwright*, 4 East, 29. So a demise "for a year and afterwards from year to year," is a demise for two years; *Birch v. Wright*, 1 T. R. 380.; although there be a stipulation for less than a half year's notice to quit; *Doe v. Green*, 9 A. & E. 658. But where the demise was "for twelve months certain, and six months' notice afterwards," Lord Ellenborough held that the tenant was at liberty to quit at the end of twelve months, giving six months' previous notice, *Thompson v. Maberly*, 2 Camp. 573. A lease for six months, and "so on for six months to six months," giving six calendar months' notice, is a demise for a year at least. *R. v. Chawton*, 1 Q. B. 247.

A tenant who entered under an agreement for a lease for seven years which is never executed, and occupied during all that period, is not entitled to notice to quit at the end of the seven years, though a notice would have been necessary to turn him out during the seven years. *Doe v. Stratton*, 4 Bing. 446.

Leases or agreements for a lease.] A question frequently occurs whether the instrument produced operates as an actual demise or is merely an agreement to demise. Upon a review of the cases it seems that words of present demise, as, "I demise,"—or future words conferring a right of enjoyment, as that the party "shall hold and enjoy,"—are evidence of an actual lease. *Harrington v. Wise*, Cro. Eliz. 486.; *Barter v. Broune*, 2 W. Bl. 973.; *Pool v. Bentley*, 12 East, 168.; *Barry v. Nugent*, cited 5 T. R. 165.; *Wright v. Trezevant*, M. & M. 231. And the mere stipulation that a lease shall at a future time be executed, which is considered in the light of a covenant for more formal assurance, will not alter the effect of such words. *Pinero v. Judson*, 6 Bing. 210.; *Doe v. Ries*, 8 Bing. 178.; *Pearce v. Cheslyn*, 4 A. & E. 225. The word *agree* will not of itself exclude the inference of a present demise, where there is nothing else to shew that such a demise

was not intended. *Per Tindal C. J., Staniforth v. Fox*, 7 Bing. 592. Where, on the face of the instrument, it was evident that a future lease was contemplated, though not expressly provided for, and at the same time various terms of the tenancy remained to be ascertained, though there were words of present demise, the instrument was held to operate as an agreement only. *Morgan v. Bissell*, 3 Taunt. 72. But in *Doe v. Benjamin*, 9 A. & E. 644. a stipulation for a future lease "on the usual terms" was held compatible with an intent to make a present demise. A landlord and tenant between whom there was a subsisting tenancy agreed in writing for the letting of the farm upon different terms, the amount of the rent to be settled by valuation, and the tenant to find sureties for his paying the rent: the amount was not settled, and the sureties were not given: Held, that the instrument, though it contained words of present demise, did not operate as a lease, or alter the terms of the existing tenancy. *John v. Jenkins*, 1 C. & M. 227. But if the terms of the lease are ascertained by the agreement, and there are words of present demise, it will operate as a lease; *Doe v. Ries*, 8 Bing. 182.; though the preparation of a future lease is provided for. *Warman v. Faithfull*, 5 B. & Ad. 1042. Again, where it is stipulated that the lessee shall do some act upon the premises before the execution of a formal lease, it is evidence of an intention to make a present demise. *Poole v. Bentley*, 12 East, 168.. And a stipulation that the agreement shall be considered binding until one fully prepared can be produced, is evidence of the same intent. *S. C. ib.*; *Doe v. Groves*, 15 East, 244. On the other hand, if a forfeiture would be incurred by holding the instrument to be a lease, it is to be presumed that the intention of the parties was to make an agreement only. *Doe v. Clare*, 2 T. R. 739. And any words which shew that a future act is to be done before the relation of landlord and tenant commences (as the purchase and addition of another piece of land to the premises) will be evidence that the instrument was not intended to operate as a lease. *Doe v. Ashburner*, 5 T. R. 163. So where a stipulation is contained in the instrument, importing that something ulterior to the agreement is to be done by way of a regular lease, this is evidence of an agreement merely. *Doe v. Smith*, 6 East, 530.; *Rawson v. Eicke*, 7 A. & E. 451. And an express stipulation for a power of distress until the lease is granted, will not make it operate as a present demise. *Bicknell v. Hood*, 5 M. & W. 104. If the party, who agrees to demise, appears on the face of the agreement to have no present power to lease, it will not be construed to be a present demise. *Hayward v. Harwell*, 6 A. & E. 265. The inference of a present demise may be prevented by an express provision that the agreement shall not operate as such. *Perring v. Brook*, 1 M. & Rob. 510.

An actual demise may be collected from two letters interchanged between lessor and lessee; *Chapman v. Bluck*, 4 New Ca. 187., 193.; and the subsequent acts of the parties are admissible to shew their intention; *S. C. ib.* But see *ante*, p. 16. Where the agreement was to be collected from mutual letters, which left some of the terms for future settlement, and contained no provision for possession before the date of the future lease, it was held not to amount to a demise. *Jones v. Reynolds*, 1 Q. B. 506.

The law is well settled, that where there is any doubt as to the operation of the contract, the court must endeavour to discover the in-

tention of the parties from the contents of the instrument ; and if they see a paramount intention that the instrument shall operate as a lease, they must hold it to be such, although it may contain conflicting expressions. *Per Tindal C. J., Pimero v. Judson*, 6 Bing. 210. ; see also *Clayton v. Burtenshaw*, 5 B. & C. 41.

Where a paper was produced by the defendant as an agreement which was properly stamped as such, but was afterwards during the trial relied upon as a lease, it was held, on a subsequent motion *in banc*, that the plaintiff could not then for the first time object that it had no lease-stamp. *Doe v. Benjamin*, 9 A. & E. 644.

Demand of possession — determination of tenancy at will.] Where a party has been let into possession pending a treaty for a purchase or a lease, *Doe v. Beard*, 13 East, 210. ; or under a void or imperfect lease or conveyance, *Litt. s. 70.* ; *Doe v. Fearnside*, 1 Wils. 176. ; *Doe v. Edgar*, 2 New Ca. 503. ; or where, having been tenant for a term which has expired, he continues in possession negotiating for a new one ; *Doe v. Stennett*, 2 Esp. 717. ; in these and the like cases the party is either strictly tenant at will, or at all events is in lawful possession, and cannot be ejected until such possession is determined by demand of possession, breaking off the treaty, or other determination of the will. *Denn v. Rawlins*, 10 East, 261. ; *Doe v. Jackson*, 1 B. & C. 448. And the demand, when necessary, must be made before the day of the demise in the declaration. *Doe v. Herbert*, 4 T. R. 680. The principle of these cases is, that "it is not the agreement, but the letting into possession, that creates the tenancy ; for the person suffered so to occupy cannot on the one hand be considered as a trespasser when he enters, and on the other hand cannot have more than the interest of a tenant at will, the lowest estate known to the law." Parke B., in *Doe v. Stanion*, 1 M. & W. 700. Where A., an assessor for the land-tax, signed an assessment in which he was named occupier and B. proprietor of a farm, this was held evidence of a tenancy at will by A. under B. *Turner v. Doe*, 9 M. & W. 643. on error. A party under contract to purchase was let into possession ; on his death his devisee took possession, and, when the vendor demanded rent, promised to pay it. Held, evidence of a tenancy at will. *Doe v. Rock*, 4 M. & G. 30.

Where a tenancy at will is thus created by a permissive occupation, any thing amounting to a determination of the will is equivalent to a demand of possession ; thus a threat "to take measures to recover possession" is sufficient. *Doe v. Price*, 9 Bing. 356. ; and see *Ball v. Cullimore*, 2 C. M. & R. 120. So where a purchaser, let into possession, refuses to complete the purchase and assigns his interest, the assignment is a determination of the will without demand. *Doe v. Abbott*, *Winton Sum. Ass.* 1838, *per Parke B.* See also *Doe v. Thompson*, *post*, p. 428. And an entry by the landlord to take stone, under circumstances that would have amounted to a trespass if the tenant had had a permanent interest, determines the estate at will. *Turner v. Doe*, 9 M. & W. 643.

Where the vendor of a term, before all the purchase-money was paid, agreed with the vendee that he should have possession of the premises till a given day, paying the reserved rent in the mean time, and that, in case he did not pay the residue of the purchase-money on that day,

he should forfeit the portion he had already paid and not be entitled to an assignment of the lease. Lord Ellenborough held that this agreement operated like a clause of re-entry on a breach of covenant in a lease, and that, the residue of the purchase-money not being paid on the appointed day, the vendee's interest thereupon ceased, and he might be ejected without any notice. *Doe v. Sayer*, 3 Camp. 8. And if a third person, under such circumstances, has come in as tenant to the vendee, ejectment may be maintained against him without notice. *Doe v. Boulton*, 6 M. & S. 148. So where a man got into possession of a house without the privity of the landlord, and the parties afterwards entered into a negotiation for a lease but disagreed about the value of the fixtures, Lord Ellenborough was of opinion that, if this was a tenancy of any sort, it was a tenancy at sufferance, and that a notice to quit was unnecessary. *Doe v. Quigley*, 2 Camp. 505; and see *Doe v. Larder*, 1 Stark. 306.; *Doe v. Puller*, 2 New Ca. 748.

The demand of possession may be made upon the wife of the tenant at will on the premises. *Roe v. Street*, 2 A. & E. 329.

Notice to quit, how proved.] Where the action is brought on the determination of the tenancy by notice to quit, the notice, if in writing, may be proved by a duplicate original, or examined copy, without a notice to produce the original. *Ame v. Beaumont*, 3 B. & B. 288., *anti*, p. 6. If the notice delivered is in writing and attested, the attesting witness must be called. *Doe v. Durnford*, 2 M. & S. 62. But secondary evidence may be given, without calling the attesting witness, if the defendant refuses to produce the original. *Pool v. Warren*, 8 A. & E. 582.

Notice to quit, at what time it must be given.] The notice to quit must be proved to have been given half a year, i. e., 182 days, before the end of the year, except where the rent is payable on the usual quarterly feast-days, when notice on one feast-day to quit on the next but one is sufficient. *Doe v. Darby*, 1 T. R. 159.; *Doe v. Kightley*, 7 T. R. 63.; *Howard v. Wensley*, 6 Esp. 53. Thus notice on the 28th of September to quit on the ensuing 25th of March is sufficient. *Roe v. Doe*, 6 Bing. 574. But the period may be controlled by special agreement or local custom. *Roe v. Charnock, Peake*, 4.; *Timmins v. Rowleson*, 3 Burr. 1609. Where the tenancy is for less than a year, the length of the notice must be regulated by the letting; as a month's notice for a monthly letting, &c. *Doe v. Hazell*, 1 Esp. 94.; see *Wilson v. Abbott*, 3 B. & C. 88. The notice must expire at the expiration of the year; *Doe v. Darby*, 1 T. R. 159; or, where the tenancy is for less than a year, at the end of such shorter period, or some corresponding period. *Kemp v. Derrett*, 3 Camp. 510. On a letting from year to year to quit at a quarter's notice, the notice must expire with the current year, unless otherwise expressly provided. *Doe v. Donovan*, 1 Taunt. 555, 2 Camp. 78. The tenancy will be taken *prima facie* to commence from the day of the tenant's entry, and not with reference to any particular quarter day. *Kemp v. Derrett*, 3 Camp. 510. But where a tenant entered in a middle of the quarter, and afterwards paid for that half-quarter, and continued to pay from the commencement of a succeeding quarter, he was held to be a tenant from the succeeding quarter-day. *Doe v. Johnson*, 6 Esp. 10. Accord. *per Best C. J.*, in *Doe v. Stapleton*, 3 C. & P. 275. However, in another case where the tenant entered in the middle of a quarter, upon an

agreement "to pay rent quarterly, and for the half-quarter," it was left to the jury to say whether the party was tenant from the quarter-day prior to the time when he entered, or from the succeeding quarter-day; and, under the direction of Lord Ellenborough, the jury found that the tenancy commenced from the preceding quarter-day. *Doe v. Selwyn, Adams, Eject.* 129. If a tenant holds over and pays rent after the expiration of his lease, notice to quit must be given with reference to the time of entry under the original lease. *Doe v. Samuel, 5 Esp.* 173. Thus, where there was a demise for one year and six months from 13th August, and the tenant held over, a notice expiring on the 13th August was held proper. *Doe v. Dobell, 1 Q. B.* 806.; see also *Berrey v. Lindley, 3 M. & G.* 498. So where a tenancy from year to year arises on payment of rent by a tenant holding under a lease void by the statute of frauds, the void lease will regulate the time of the notice. *Doe v. Bell, 5 T. R.* 472. A variation in the rent agreed upon, during the tenancy, does not make a new tenancy. *Doe v. Kendrick, Ad. Eject.* 129. (2d ed.) Where the tenant enters upon different parts of the premises at different times, it is sufficient to give half a year's notice to quit with reference to the original time of entry on the substantial part of the premises demised; and this will be good for all. *Doe v. Snowdon, 2 W. Bl.* 1224.; *Doe v. Watkins, 7 East,* 551. And it is a question for the jury, which is the principal and which the accessorial subject of demise. *Doe v. Howard, 11 East,* 498. And *quære* whether, if the notice is sufficient as to part of the premises included in the demise, the plaintiff may recover the whole? *Doe v. Rhodes, 11 M. & W.* 600. A holding from Michaelmas *primâ facie* signifies Michaelmas new style. *Doe v. Vince, 2 Camp.* 257. But where the tenancy, which was by parol, was from Michaelmas to Michaelmas, Lord Kenyon permitted evidence to be given, that by the custom of the country such a tenancy was considered to be from old Michaelmas. *Furley v. Wood, Runn. Ej.* 112. *S. C. 1 Esp.* 198.; *Doe v. Benson, 4 B. & A.* 588. So evidence of the intention of the parties is admissible. *Doe v. Hopkinson, 3 D. & R.* 507. But where, in a lease by deed, the tenancy was "from the feast of St Michael," it was held that those words imported new Michaelmas, and could not be shewn by extrinsic evidence to refer to old Michaelmas. *Doe v. Lea, 11 East,* 312.; *Smith v. Wallon, 8 Bing.* 235. Where the notice was delivered on September 27th to quit "at the expiration of the term for which you hold the same," which notice was served personally on the tenant, who observed, "I hope Mr. M. does not mean to turn me out," Holroyd J. permitted the lessor to prove that it was the general custom, in that part of the country where the demised lands lay, to let the same from Lady-day to Lady-day, and that the defendant's rent was due at Michaelmas and Lady-day respectively; and he directed the jury to presume that this tenancy, like other tenancies in that part of the country, was from Lady-day to Lady-day. *Doe v. Lamb, Adams, Eject.* 316, 3rd ed. A notice to quit, not personally served upon the tenant, is not of itself even *primâ facie* evidence of the tenancy having commenced at that period of the year at which the notice expires. *Doe v. Calvert, 2 Camp.* 388. But if personally served upon the tenant, who reads, or has it read to him, and does not object to it, it amounts to an admission, and is *primâ facie* evidence of the commencement of the tenancy, if a specific time for quitting be mentioned in it. *Doe v. Thomas, 2 Camp.* 648.; *Doe*

v. Forster, 13 *East*, 405. Such evidence may be rebutted by shewing the period when the tenancy did in fact commence. *Doe v. Coppus*, 4 *T. R.* 361. Where no specific time to quit was mentioned, but the notice was to quit "at the expiration of the current year," and a declaration in ejectment was served nearly a year afterwards, laying the demise half a-year after the notice, and the tenant, on being served with the declaration, made no objection to the notice to quit, nor set up any right to a longer possession, Lord Ellenborough held that it was a question for the jury whether the tenant must not be understood as having admitted that the tenancy was determined by the notice. *Doe v. Woombwell*, 2 *Camp.* 559. So where a notice was given to a weekly tenant to quit "on Friday, provided his tenancy expired on Friday, or otherwise at the end of his tenancy next after one week from the date of this notice," upon an ejectment brought after a sufficient time had elapsed to cover a tenancy commencing on any day of the week, the notice was held sufficient. *Doe v. Scott*, 6 *Bing.* 362. If the tenant, upon application by his landlord, states his tenancy to have commenced on a particular day, he is concluded from disputing the accuracy of such statement. *Doe v. Lambly*, 2 *Esp.* 635. Receipt of rent, as a year's rent up to a particular day, is *prima facie* evidence of the commencement of the tenancy at that day. *Doe v. Samuel*, 5 *Esp.* 173.

Notice to quit, by whom to be given.] One of several joint-tenants may give notice, which will be good, at least for his share. *Doe v. Chaplin*, 3 *Taunt.* 120. And where it purports to be given on behalf of himself and the other joint-tenants, it is good for the whole. *Doe v. Summervett*, 1 *B. & Ad.* 135. And it seems a notice by one alone determines the whole where the tenant holds under the joint demise of all, although the co-tenants do not concur in the notice. *S. C. ib.* 140. See 2 *M. & R.* 434. (n). So where an agent gives the notice in the name of all, but by the authority of one only, it is good for all; for *per Parke B.*, the lessee holds only so long as all agree. *Doe v. Hughes*, 7 *M. & W.* 139., accord. *per Coleridge J.*, in *Alford v. Vickery*, *Exeter Spr. As.* 1842. But a notice, required to be "under the hands" of the lessors, is not good, if signed only by two out of three. *Doe v. Cuthell*, 5 *East*, 491. A notice signed by a stranger professing to be an agent for all the joint-tenants, ratified before ejectment brought, was held to be sufficient; *Doe v. Woodward*, 3 *B. & A.* 689; but the authority of this case has been questioned, and it has been held that a subsequent ratification is not sufficient unless given before the notice begins to run. *Doe v. Walters*, 10 *B. & C.* 626. Nor is the bringing an action a sufficient recognition. *S. C. ib.* For the notice must be one on which the lessee can safely act when given. *Doe v. Goldwin*, 2 *Q. B.* 143. Where the landlord is partner in a firm to which he has let the premises, he may eject upon a notice to himself and co-tenants. *Per Patteson J.* *Doe v. Francis*, *Cornwall Sum. As.* 1837., *S. C.* 4 *M. & W.* 331. Where there was a proviso in a lease, that if either of the parties should be desirous to determine it, it should be lawful for him, "his executors or administrators," so to do upon twelve months' notice to the other of them, "his heirs, executors," &c., it was held that the devise of the lessor was entitled to give such notice. *Roe v. Hayley*, 12 *East*, 464. A receiver appointed by the Court of Chancery with authority to let

lands has also authority to give a notice to quit. *Doe v. Read*, 12 *East*, 57. But a mere receiver of rent, as such, has no power to determine a tenancy. *Per Parke J., Doe v. Wallers*, 10 *B. & C.* 633. An agent to receive and let has authority to determine a tenancy. *Per Patteson J., Doe v. Mizem*, 2 *M. & Rob.* 56. An agent of an agent cannot give a notice. *Doe v. Robinson*, 3 *New Ca.* 677. A verbal notice from the steward of a corporation is sufficient, without shewing an authority under seal. *Roe v. Pierce*, 2 *Camp.* 96.; recognised in *Smith v. Birmingham Gas Co.*, 1 *A. & E.* 531.

Notice to quit, to whom to be given.] Where the premises have been underlet, the sub-tenancy must be determined either by a notice from the lessor to the lessee, or from the lessee to the sub-lessee; a notice from the lessor to the sub-lessee is inoperative; *Pleasant v. Benson*, 14 *East*, 234.; and unnecessary; *Roe v. Wiggs*, 2 *New Rep.* 330. The notice from the lessor to the lessee should be served upon the latter; service upon a relation of the sub-tenant on the premises is insufficient, though addressed to the original lessee. *Doe v. Levi, Adams, Eject.* 115. Where A. had been tenant of certain premises, and, upon his leaving them, B. took possession, it was held that, in the absence of any evidence to the contrary, it might be presumed that he came in as assignee of A., although he had never paid rent; and that notice to quit was therefore rightly given to B. *Doe v. Williams*, 6 *B. & C.* 41. Where a corporation is tenant, notice to quit should be given to the corporation, and served upon its proper officers. *Doe v. Woodman*, 8 *East*, 228.

Notice to quit, form of.] The form of notice is not material. It must, however, refer to some distinct time; therefore a notice to quit "forthwith," or "from henceforth," or "to quit" generally, would be bad. *Goode v. Howells*, 4 *M. & W.* 199. 201. But *semble*, a notice to quit given by a tenant "as soon as by law he might," would be good. *Per Lord Abinger C. B. ib.* The notice may be by parol, unless required to be in writing by agreement of the parties (*Timmins v. Rowleson*, 3 *Burr.* 1603.; *Doe v. Crick*, 5 *Esp.* 196.) or by the provisions of a power. *Doe v. Benion, Willes*, 43. Though the courts listen with reluctance to objections to the form of the notice, (*Doe v. Archer*, 14 *East*, 245.), it must yet be explicit and positive, and not give the tenant an option of continuing under a new agreement; but a notice to quit, "or I shall insist on double rent," was held good, because the latter part of the notice evidently referred only to the penalty inflicted by 4 Geo. 2. c. 28., though the terms of that statute (which gives double the annual value) were mistaken. *Doe v. Jackson*, 1 *Doug.* 175. If the notice had really contained the option of a new agreement, and said, for instance, "or else that you agree to pay double rent," Lord Mansfield C. J., was of opinion that it would not have been good. *Ibid.* Where the notice stated that the tenant on failure would be required to pay double rent or value so long as he detained possession, it was held good. *Doe v. Goldwin*, 2 *Q. B.* 143. So where the notice was to quit "on the 25th day of March, or 8th day of April next ensuing," and was delivered before new Michaelmas day, it was held good as intended to meet a holding commencing either at new or old Lady day, and not to give an alternative. *Doe v. Wrightman*, 4 *Esp.* 5. And it has been held that a notice to quit at "Michaelmas," will do either for

old or new Michaelmas-day according to the period of the commencement of the tenancy. *Doe v. Vince*, 2 Camp. 256; *Doe v. Walker*, 2 Peake Add. Ca. 194. A notice to quit on the 24th of June, "agreeably to covenant," the covenant requiring a notice expiring at Michaelmas, is bad; and evidence is not admissible to shew that the landlord understood it to mean Michaelmas. *Cadby v. Martinez*, 11 A. & E. 720. An obvious mistake will not vitiate the notice; as where a notice was given at Michaelmas, 1795, to quit at Lady-day, "which will be in the year 1794," and the defendant was told at the time of the service of the notice that he must quit at next Lady-day. *Doe v. Kightly*, 7 T. R. 63. So a notice dated 27th September, and served on the 28th, requiring the tenant to quit at "the end of his current year," (which was Michaelmas), will be understood to mean Michaelmas in the succeeding year. *Doe v. Culliford*, 4 D. & R. 248. So, where the tenancy of land began on 2d February, and of houses on 1st May, a notice dated and served on 22nd October, 1833, to quit both land and houses, "at the expiration of half a year from this notice, or at such other time or times as your present year's holding of the premises or any part thereof respectively shall expire after the expiration of half a year from this notice," was held a sufficient notice to determine the tenancy of the houses on 1st May, 1834, and of the lands on 2nd February, 1835. *Doe v. Smith*, 5 A. & E. 350. A misdescription of the premises which can lead to no mistake will not be fatal, as where a house is described as "the Waterman's Arms," when in fact it is called "the Bricklayer's Arms," there being no sign called the Waterman's Arms in the parish. *Doe v. —*, 4 Esp. 185. So where the parish was misnamed in the notice. *Doe v. Wilkinson*, 12 A. & E. 743. As a lessor cannot determine the tenancy as to part of the things demised and continue it as to the rest, the notice must include all the premises held under the same demise, and the courts will if possible give effect to the notice so as to determine the tenancy altogether. *Doe v. Archer*, 14 East, 245; *Doe v. Church*, 3 Camp. 71. Where the notice is directed to the tenant by a wrong christian name, and he keeps it, the irregularity is waived. *Doe v. Spiller*, 6 Esp. 70. A notice to quit to a tenant of lands originally devised to the rector and churchwardens of a parish and their successors in trust, signed by the rector and churchwardens, requiring the tenant to deliver up the premises "to the rector and churchwardens for the time being" (there being no such corporation) is bad. *Doe v. Fairclough*, 6 M. & S. 40. Where a tenant gives an irregular notice to quit, the landlord cannot treat it as a surrender. *Doe v. Milward*, 3 M. & W. 328.

Notice to quit, service of.] When the notice is in writing, it is not necessary that it should be personally served upon the tenant. *Doe v. Wrightman*, 4 Esp. 5. It is sufficient if the notice is delivered and explained to the servant of the tenant at his dwelling-house, though the dwelling-house be not on the demised premises; such service affording presumptive evidence that the notice came to the hands of the tenant, the servant not being called; *Doe v. Marsh*, 4 T. R. 464; and it is sufficient, though the tenant, by reason of absence, be not informed of it till within half a year of its expiration. *Doe v. Dunbar*, M. & M. 10. And it seems that service at the tenant's dwelling-house is sufficient, without proof that he in fact received it; *id. n. (a)*;

Smith v. Clark, 9 Dowl. P. C. 202.; but it is not sufficient that the notice was left at the tenant's dwelling-house without shewing that it was delivered to a servant and explained to him, or that it came to the tenant's hands. *Doe v. Lucas*, 5 Esp. 153. Service of the notice on the premises upon one of two joint-tenants who resides on the premises, is presumptive evidence of the notice having reached the other joint-tenant. *Doe v. Watkins*, 7 East, 557.; *Doe v. Crick*, 5 Esp. 196. If there be a sub-tenant, the notice from the original lessor must be served upon the lessee. See *suprà*, p. 425. Notice to a corporation may be served upon its proper officers. *Doe v. Woodman*, 8 East, 228.

Notice to quit, waiver of.] The notice may be waived by the acceptance of rent after the expiration of the notice; but the rent must be received *quâ* rent, and this is a question for the jury. *Doe v. Cordwent*, 6 T. R. 219.; *Doe v. Ballen*, Cowp. 243. Where a quarter's rent, due after the expiration of the notice, had been received by the landlord's banker without any special authority, though the rent was usually paid to him, it was held, in the absence of any proof that the rent had come to the landlord's hands, to be no waiver. *Doe v. Calvert*, 2 Camp. 387. A distress for rent accruing after the expiration of the notice is a waiver. *Doe v. Willingale*, 1 H. Bl. 311. So a recovery in an action for use and occupation for a period subsequent to the expiration of the notice. *Birch v. Wright*, 1 T. R. 387. The notice may be waived by a subsequent notice; for it recognises a tenancy subsisting after the expiration of the former. *Doe v. Palmer*, 16 East, 53. But where a second notice was given after the expiration of the first, and after the commencement of an ejectment in which the landlord continued to proceed notwithstanding the second notice it was held no waiver; for it was not possible for the defendant to suppose that the plaintiff intended to waive the first notice, when he knew that the plaintiff was, on the foundation of that very notice, proceeding by ejectment to turn him out. *Doe v. Humphreys*, 2 East, 237. So where, after the expiration of a notice, the landlord gave a second notice, "I do hereby require you to quit the premises which you now hold of me within fourteen days from this date, otherwise I shall require double value," it was ruled that the latter notice, having for its object only the recovery of the double value, did not operate as a waiver. *Doe v. Steel*, 3 Camp. 115. So where no notice to quit was necessary, and a notice was given "to quit the premises which you hold under me, your term therein having long since expired," the court considered it a mere demand of possession, and not a recognition of a subsisting tenancy. *Doe v. Inglis*, 3 Taunt. 54. And where a landlord gave his tenant notice to quit, but promised not to turn him out unless the premises were sold; and afterwards, and after the expiration of the notice to quit, the premises were sold, but the tenant refused to deliver up the possession; it was held that the promise was no waiver of the notice, and that the refusal of the tenant made him a trespasser from the expiration of the notice to quit. *Doe v. Symonds*, 10 East, 13. A notice may be waived by the tenant who gives it, as well as by a landlord; and where the tenant continued in possession after the expiration of the notice, under an alleged custom, it is a question for the jury whether he intended to waive the notice, or merely acted in pursuance of the supposed right to continue for certain purposes after the end of the tenancy. *Jones v. Shears*, 4 A. & E. 832.

Notice to quit, when dispensed with by disclaimer.] When a tenant from year to year has attorned to another person, or done any act disclaiming to hold of his landlord, or has in any way put him at defiance, the landlord may treat him as a trespasser, and no notice to quit will be necessary. *B. N. P.* 96. ; *Doe v. Whittick, Gow.* 195. The act must be one inconsistent with the relation of landlord and tenant ; thus, where the tenant, who had concluded a bargain for the purchase of the property from his landlord, refused to deliver it up to the landlord on demand, saying, " he had bought it and would keep it, and was ready to pay the money ;" it was held that this was no disclaimer on which ejectment would lie without notice. *Doe v. Stanion, 1 M. & W.* 695. So a refusal to pay rent to a devisee under a contested will, the tenant declaring that he was ready to pay the rent to any person entitled to it, was held not to dispense with a notice to quit. *Doe v. Pasquali, Peake,* 196. So where rent is demanded by the assignee of the lessor it is no disclaimer, if the defendant withholds rent while he is honestly inquiring into the assignee's title, or because he believes himself liable to the assignor. *Doe v. Cooper, 1 M. & G.* 135., 138. And it seems that whether the act amounts to a disclaimer is for the judge ; whether the evidence proves a disclaimer is for the jury ; *S. C. ib.* ; and see *Doe v. Evans, 9 M. & W.* 48. The mere act of paying the rent to a third person does not operate as the forfeiture of a lease. *Doe v. Parker, Gow.* 180. But where a tenant pays rent to a third person claiming to be landlord, and allows him to mark and cut the trees, the submission to these acts by the tenant is an acknowledgment of the title of the claimant. *Per Lord Tenterden C. J., Doe v. Grubb, 10 B. & C.* 824. And where the defendant, who held under a tenant for life, received on his death a letter from the lessor of the plaintiff, claiming as heir and demanding rent, to which the defendant answered that he held the premises as tenant to S., that he had never considered the lessor of the plaintiff as his landlord, that he should be ready to pay the rent to any one who should be proved to be entitled to it, but that, without disputing the lessor of the plaintiff's pedigree, he must decline taking upon himself to decide upon his claim without more satisfactory proof in a legal manner, it was held that this was a disclaimer ; *Doe v. Frowd, 4 Bing.* 557. ; in which case, Best C. J. doubts the necessity of a notice in any case where there is not a tenancy admitted on both sides. Where tenant at will died, and his heir entered and claimed the land as his own, held that the devisees of the lessor might eject without notice or demand. *Doe v. Thompson, 5 A. & E.* 532. ; *antè*, p. 421. Where a tenant for years delivered up possession of the premises and the lease, in fraud of his landlord, to a person claiming under a hostile title, it was held to be a forfeiture of the lease. *Doe v. Flynn, 1 C. M. & R.* 137. So where the tenant said to the landlord, " I have no rent for you, for P. has ordered me to pay none," it was held to be a disclaimer. *Doe v. Pittman, 2 Nev. & M.* 673. A mere verbal disclaimer without any other act done, may be a forfeiture ; *Parke B., in Doe v. Stanion, 1 M. & W.* 702. And where the ejectment is brought against several joint defendants who hold separate tenements, the plaintiff may recover against those who have disclaimed, and fail as to the others. *Doe v. Clarke, Peake, Add. Ca.* 239.

The doctrine of forfeiture by disclaimer *in pais* has been sometimes

considered to extend beyond a mere tenancy from year to year, and to operate as a forfeiture of a long term of years under a lease by deed. See *Doe v. Flynn*, 1 C. M. & R. 137. But this doctrine can no longer be supported; for in *Doe v. Wells*, 10 A. & E. 427., it was held that a definite term of years was not forfeited by an oral refusal to pay rent on the ground that the land belonged to the tenant, and not to his lessor; and the court there considered a disclaimer by a yearly tenant to be rather evidence of a determination of the will which limits the duration of the estate, than a forfeiture of the estate.

The disclaimer must be before the date of the demise in the declaration; and an admission of a disclaimer, made after it, must, in order to have the effect of determining a tenancy, amount to an admission that such disclaimer took place before the day of the demise; *Doe d. Lewis v. Cawdor*, 1 C. M. & R. 398.; *Doe v. Litherland*, 4 A. & E. 784.; and the admission of the tenant in possession, is evidence against one who defends as his landlord. *Doe v. Litherland*, *ib.*

Proof of forfeiture of the lease.] Where the lessor proceeds on the forfeiture of the lease, he must prove the demise and the forfeiture incurred. The general rule is that a clause of re-entry is to be construed strictly. *Per Lord Tenterden C. J. Doe v. Marchetti*, 1 B. & Ad. 720. Where the forfeiture is for the nonperformance of a covenant, the lessor of the plaintiff must give some evidence of the nonperformance, and it will not in the first instance lie upon the defendant to prove a performance. *Doe v. Robson*, 2 C. & P. 245. The right of re-entry will appear on proof of the lease. In an agreement of demise it was "stipulated and conditioned that the tenant should not assign," &c.; this was held to be a condition for the breach of which the lessor might maintain an ejectment. *Doe v. Watt*, 8 B. & C. 308. Where the lessee underlet, and in the underlease there was a proviso that, in case of a breach of covenant, the lessor and lessee might enter, it was held that the lessee alone might take advantage of this proviso. *Doe v. White*, 4 Bing. 276. But where a mortgagor and mortgagee joined in a lease reserving a power of re-entry to them, or either of them, for a breach of covenant, it was held that a joint demise in the declaration was improper, because the estate revested in the mortgagee only. *Doe v. Adams*, 2 C. & J. 232.

If the proceeding be at common law on a condition of re-entry for nonpayment of rent, there must be a demand of the precise rent due, on the exact day on which it became due, at the proper place of payment, at a convenient hour before sunset. 1 *Saund.* 287. (n); *Doe v. Paul*, 3 C. & P. 613. And these formalities must still be observed where there is a sufficient distress on the premises, unless the lease stipulates that they shall not be necessary. *Doe v. Masters*, 2 B. & C. 490. But by statute 4 Geo. 2. c. 28., where half a year's rent is in arrear, the lessor may, without any formal demand or re-entry, serve a declaration in ejectment; or in case it cannot be served, or no tenant be in possession, affix the same upon the door of the messuage, or if the ejectment be not for a messuage, upon some notorious place of the lands, &c.; and such affixing shall be deemed legal service thereof; which service or affixing shall stand in the place of a demand or re-entry; and in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, it shall be made appear to the court

where the said suit is depending by affidavit, or be proved upon the trial if the defendant appears, that half a year's rent was due before the declaration was served, and that no sufficient distress was to be found upon the demised premises countervailing the arrears then due, and that the lessor had power to re-enter, in such case the lessor shall recover judgment as if the rent in arrear had been legally demanded, and a re-entry made.

Where a lease contained a proviso for re-entry in case the rent was in arrear twenty-one days after the day on which it was due, "being lawfully demanded," it was held to be within the statute, and that it was unnecessary to prove an actual demand. *Doe v. Alexander*, 2 M. & S. 525.; accord. *Doe v. Wilson*, 5 B. & A. 363.

Under this statute the landlord must be prepared with evidence of the service of the declaration in ejectment, or of the affixing of the same to the door of the messuage, &c.; that half a year's rent was due; and that no sufficient distress was found on the premises. It is no ground of nonsuit that the declaration was served on a day subsequent to the day on which the demise was laid, that being after the rent became due. *Doe v. Shawcross*, 3 B. & C. 752. It is sufficient, *prima facie*, to prove that there was no sufficient distress on the premises on a certain day between the day when the rent became due and the service of the declaration. *Doe v. Fuchau*, 15 East, 286. It must appear that every part of the premises has been searched; *Doe v. King*, cited 2 B. & B. 514., S. C. *Forrest*, 19.; unless the tenant has prevented the landlord from having access to the premises, as by locking the doors; for a distress which cannot be made without a trespass is no available distress within the act. *Per Lord Tenterden C.J.*, *Doe v. Dyson*, M. & M. 77. A variance between the amount of rent proved to be due, and that demanded in the lessor of the plaintiff's particular, is immaterial. *Tenny v. Moody*, 3 Bing. 3.

Where the action is brought on a proviso of re-entry in case of breach of covenant, the court will compel delivery of a particular of the covenants and breaches intended to be relied on at the trial, and the proof must be according to the terms of the particular. *Doe v. Phillips*, 6 T. R. 597. And where the particular relies on noncultivation, it is not enough to prove an improper course of husbandry. *Doe v. Broad*, 2 M. & G. 523. If brought on a forfeiture incurred by assigning or underletting, it is sufficient *prima facie* to prove a third person in possession of the premises acting and appearing as the tenant, and the declarations of such person are said to be evidence. *Doe v. Rickarby*, 5 Esp. 4.; *Doe v. Williams*, 6 B. & C. 41. But Lord Ellenborough was of opinion that such proof was insufficient, as *non constat* that the third person was not a mere intruder. *Doe v. Payne*, 1 Stark. 86.; see *ante*, p. 396. 398.

Where a rent-charge is granted, with power to the grantee in case the rent shall be in arrear for a certain time to enter and enjoy the lands charged, and to receive the rents &c. for his own use until satisfaction of the arrears, the grantee may, upon the rent becoming in arrear, maintain ejectment against the terretenant without proof of a previous demand of the rent. *Doe v. Horsley*, 1 A. & E. 766. It is doubtful whether one of several parceners can alone recover in ejectment on a forfeiture of a lease made by their ancestor. *Doe v. Lewis*, 5 A. & E. 277.

Forfeiture waived.] Where the lease is voidable at election, and not void, the defendant may shew that the forfeiture has been waived. A lease for lives is voidable only, by entry, though the condition be that the lease "shall be void." 1 *Saund.* 287 d. (n.) So where a lease for years is conditioned to be void for the benefit of one party, it is in the election of that party alone to treat it as void; therefore where, in a lease for years, the condition is that, upon the breach of some covenant by the lessee, the lease "shall be void," it is voidable only at the option of the lessor; *Doe v. Bancks*, 4 B. & A. 401.; *Reed v. Farr*, 6 M. & S. 121. So if the condition be that "the lessor shall re-enter," a term of years is only voidable. *Pennant's case*, 3 Rep. 64. a.; *Doe v. Davids*, *Cowp.* 804. And where the proviso was, "that if the rent should be in arrear for twenty-one days after demand made, or if any of the covenants should be broken, then the term, or so much thereof as should be then unexpired, should cease, determine, and be wholly void, and it should be lawful to and for the landlord upon the demised premises wholly to re-enter, and the same to hold for his own use, and to expel the lessee," it was held that the lease was voidable only, and not void; and that the landlord was bound to re-enter if he wanted to avail himself of a forfeiture. *Arnaby v. Woodward*, 6 B. & C. 519. So a similar proviso in a licence for a term of twenty-one years to enter upon A.'s lands to search and dig, was held to make it voidable only, and that some act of A. to shew his election to enforce the forfeiture was necessary to put an end to the licence. *Roberts v. Davey*, 4 B. & Ad. 664. Merely lying by and witnessing a forfeiture is not a waiver. *Doe v. Allen*, 3 Taunt. 78. But acceptance of rent accruing since the forfeiture is a waiver, if the lessor had notice of the forfeiture; which notice is a material and issuable fact. *Doe v. Davids*, *Cowp.* 804.; *Roe v. Harrison*, 2 T. R. 430, 431.; *Pennant's case*, 3 Rep. 64. b. So bringing an action for such rent is a waiver. *Roe v. Minshul*, B. N. P. 96.; *S. C. Selw. N. P.* 677. But where the proviso avoided the lease by neglect of repairs three months after notice to do them, and notice was given accordingly on 1st January, receipt of rent due on 25th March was held no waiver. *Doe v. Brindley*, 4 B. & Ad. 84., 86. The lessor does not waive his right of re-entry by taking an insufficient distress for the rent by the non-payment of which the lease became forfeited; for the statute gives the right to eject only if there be no sufficient distress; but it was otherwise at common law. *Doe v. Eaton*, 3 Doug. 231., cited 6 T. R. 220. And where a lease contained a clause of re-entry in case the rent should be in arrear twenty-one days and there should be no sufficient distress, Lord Ellenborough held that the landlord, having distrained within the twenty-one days and continued in possession after, did not waive his right of re-entry. *Doe v. Johnson*, 1 Stark. 411. In the case of a proviso to re-enter after three months' notice, an agreement to allow the tenant more than three months' time to repair is a suspension, and not a waiver, of the forfeiture. *Doe v. Brindley*, *supra*. If the breach be a continuing one, as the using of rooms in a manner prohibited by the lease, the acceptance of rent after such user is not a waiver of the forfeiture incurred by the subsequent user. *Doe v. Woodbridge*, 9 B. & C. 376. Forfeiture by insolvency is waived by accepting rent from the insolvent after his discharge; and the non-payment of a scheduled debt due to the lessor is not a continuing insolvency. *Doe v. Rees*, 4 New Ca. 384.

Where a lease contained a general covenant to repair, and also a covenant to repair upon three months' notice, Lord Ellenborough held that the landlord, by giving a notice "to repair forthwith," had not waived his right of re-entry for the breach of the general covenant. *Roe v. Paine*, 2 Camp. 520. But where a lease contained covenants to keep the premises in repair, and to repair within three months after notice, and a clause for re-entry for the breach of any covenant, and the landlord gave a notice to repair within three months; it was held that this was a waiver of the forfeiture incurred by the breach of the general covenant, and that the landlord could not bring ejectment until the expiration of the three months. *Doc v. Meux*, 4 B. & C. 608. "In *Roe v. Paine* (*supra*) the language of the notice was very different; the tenant was required to put the premises in repair *forthwith*; that did not prevent the landlord from bringing his ejectment at any time;" *Per* Bayley J., *ibid.* 609.; and see *Doc v. Miller*, 2 C. & P. 348. So where, besides the general covenant to repair, there was a proviso that if the lessee did not repair within two months after notice, the lessor might enter and do the repairs himself at the tenant's expence, it was held that the lessor could not proceed to eject on the general covenant, after giving the tenant notice to repair under the above proviso. *Doc v. Lewis*, 5 A. & E. 277.

In one case Lord Tenterden C. J. held that the acts of the landlord, though not amounting to a waiver or release, might so mislead the tenant as to prevent the accruing of a forfeiture. In an ejectment on the forfeiture of a lease wherein the lessee covenanted to insure in the joint names of himself and the lessor and in two-thirds of the value of the premises demised, it appeared that the lessee had insured in his own name only, and, as contended, to a less amount than two-thirds of the value. Both parts of the lease remained in the possession of the lessor, and an abstract only had been delivered by him to the lessee, which contained no mention that the insurance was to be in the joint names, though it stated that it was to be in two-thirds of the value. The lessor of the plaintiff had previously insured the premises at the same sum as the defendant. It was held that, the conduct of the lessor being such as to induce a reasonable and cautious man to conclude that he was doing all that was required of him in insuring in his own name, and to the amount insured, he could not recover for a forfeiture. *Doc v. Rowe*, R. & M. 343. But this decision, however equitable, seems to be unsatisfactory in principle.

Where the forfeiture is for non-payment of rent, the tenant, by stat. 4 Geo. 2. c. 28., may prevent it by tendering the rent. "The statute is beneficial to the tenant as well as the landlord. It relieves the latter from the necessity of making a demand with all the precision required at common law, and the tenant incurs no forfeiture until the declaration in ejectment is served upon him; and if at that time he is ready to pay the rent, although he did not tender it when it was due, it gives him the same benefit as if he had tendered it at that time." *Per* Holroyd J., *Doc v. Shawcross*, 3 B. & C. 756.

When the proceeding is upon 11 Geo. 4. & 1 W. 4. c. 70. s. 36. (which authorises service upon tenants within ten days after right of entry accrued) it is no objection at Nisi Prius that the declaration was not served within the ten days. *Doc v. Brindley*, 4 B. & Ad. 84.

By Heir-at-Law.

Where the lessor of the plaintiff claims as heir-at-law, he must, at common law, prove (1.) that the ancestor from whom he claims was actually seised of the land ; or, if he claims as heir to a remainderman, that the ancestor from whom he claims was the person in whom the remainder first vested by purchase ; *Radcliff's case*, 3 Rep. 42. a., *Walk. on Desc.* 120. ; (2.) that he is heir to such ancestor. The necessity of this proof is founded on the rule of law, "*seisina facit stipitem*;" but the late act 3 and 4 Wm. 4., c. 106., appears to have made a change in the law in this respect.

By sect. 2. of that act, "in every case descent shall be traced from the purchaser ; and to the intent that the pedigree may never be carried further back than the circumstance of the case and nature of the title require, the person *last entitled* to the land shall, for the purposes of that act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited shall be considered to have been the purchaser, unless it shall be proved that he inherited ; and in like manner the last person from whom the land shall be proved to have been inherited, shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same."

By sect. 1. of the same act its provisions are made to extend to all hereditaments, corporeal or incorporeal, freehold, copyhold, or customary, and to any possibility, right, or title of entry or action, and to any other interest capable of being inherited, whether in possession, reversion, remainder, or contingency ; and the word "purchaser" is explained to mean the person who last acquired the land, otherwise than by descent, &c. ; and the "person last entitled" extends to the last who had a right to the land, whether he did or did not obtain the possession or receipt of the rents and profit.

By sect. 4., when any one shall acquire land by purchase under a limitation to the heir or heirs of the body of any of his ancestors, in any assurance executed after the 31st December, 1833, or in any will of a testator dying after that day, the land shall descend and the descent be traced as if his ancestor had been the purchaser.

By sect. 10. an heir may trace his descent through an attainted person who died before the descent took place, unless the land escheated in consequence of the attainder before 1st January, 1834.

The act does not extend to any descent before 1st of January, 1834. Sect. 11.

As the effect of the statute has not yet been fully developed by the decisions of the courts, and the old law must for some time continue to be a subject of inquiry in actions of ejectment, the cases on the latter head have been retained.

Proof of seisin.] Seisin in fee may be proved by showing the ancestor in actual possession, or that he received rent from the person in possession, which is presumptive evidence of seisin in fee ; *Co. Litt.* 15. a. *B. N. P.* 103. ; *Jayne v. Price*, 5 Taunt. 326., *anté*, p. 22. ; and the declarations of a deceased tenant that he held under A. B. are admissible to prove the seisin of A. B. though offered in evidence against a stranger by a party claiming under A. B. *Peaceable v. Watson*,

4 *Taunt.* 16. ; *Carne v. Nicoll*, 1 *New Ca.* 430. See *antè*, p. 35. Proof of possession of the premises by the ancestor's lessee for years is evidence of seisin ; for the possession of a tenant for years gives an actual seisin to the owner of the inheritance. *Co. Litt.* 243. a. ; *Bushby v. Dixon*, 3 *B. & C.* 298. So the possession of guardian in socage confers an actual seisin upon the infant. *Doe v. Newman*, 3 *Wils.* 516. Evidence of shooting and appointing a gamekeeper by the lord of a manor is not properly referable to a right of soil ; *per* Bailey J., *Tyrrwhitt v. Wynne*, 2 *B. & A.* 560. ; though it is evidence that the locus is within the limits of the manor. *Doe v. Langton*, 2 *B. & Ad.* 680. Holding courts and appointing keepers is proof of the existence and seisin of a manor. *Doe v. Heakin*, 6 *A. & E.* 495. ; *antè*, p. 29.

Proof of descent.] The lessor of the plaintiff must prove that all the intermediate heirs between himself and the ancestor under whom he claims are dead without issue. *Richards v. Richards*, 15 *East*, 294 (a). As to the presumption of the duration of life, and of death without issue, see *antè*, p. 25. If the lessor of the plaintiff claims as collateral heir, he must prove the descent of himself and the person last seised from a common ancestor ; or at least from two brothers or sisters. *Doe v. Lord*, 2 *W. Bl.* 1100. See 3 & 4 *W. 4.* c. 106. s. 5. As to proof of births, marriages, and deaths, see *antè*, pp. 84. 141. 150. For other evidence usually adduced in cases of pedigree, see *antè*, title "*Hearsay*," pp. 26, 27, 28. ; *Heralds' Books*, p. 149.

Marriage may be proved by reputation ; *Reed v. Passer, Peake*, 233. ; or by cohabitation ; *B. N. P.* 114. ; and it is not necessary in the first instance to give evidence of the regular publication of the banns, or of the regularity of the licence ; for the presumptive proofs of marriage have not been taken away by the marriage act. *St. Devereux v. Much Dew Church*, 1 *W. Bl.* 367. Even where the parents are alive, reputation is sufficient evidence of the marriage in ejectment by the son. *Doe v. Fleming*, 4 *Bing.* 266. Either of the married parties, provided they be not interested, is competent to prove or disprove the marriage. *Doe v. Moss, Coup.* 593. But where the marriage is not disputed, neither husband nor wife can be allowed to prove, directly or indirectly, non-access ; *R. v. Sourton*, 5 *A. & E.* 180. ; though they may bastardize their issue by any other evidence except non-access, *per* Patteson J., *ib.* 186. The rule that the issue shall not be bastardized after death is confined to the single case of bastard *eigne* and *mukier puisne*. *Pride v. Earl of Bath*, 1 *Salk.* 120.

The declarations of a relative are not evidence when he can himself be produced. *Pendrell v. Pendrell*, 2 *Str.* 925. On an issue to try the right to nominate to a fellowship, vested in the heirs male of the body of A. who died *temp. Eliz.*, the question on the record was, "whether the plaintiff or the defendant had the better right to nominate." The plaintiff proved his descent in tail male from a third son of A. : Held, that he had done enough to put defendant on the proof that he was a nearer heir male. *Sandys v. Sandys*, 1 *Q. B.* 316.

Defence.

Proof of illegitimacy.] The defendant may prove the marriage void by a prior marriage, want of age, want of reason, or the non-observance of the solemnities required by the marriage act. 2 *Phill. Ev.* 235. The acts which regulate marriages are now 4 Geo. 4. c. 76. as to marriages according to the Church of England; and 6 and 7 Wm. 4. c. 85., and 7 Wm. 4. and 1 Vict. c. 22. as to other marriages. See *post*, *Trespass for Adultery*.

To prove the illegitimacy of a child, want of access or any other circumstances which tend to show that the husband could not, in the course of nature, have been the father of his wife's child, are good evidence. *R. v. Luffe*, 8 East, 206. And presumptive evidence of non-access is admissible. *Doe v. Saul*, 4 T. R. 356. Whenever a husband and wife are proved to have been together at a time when, in the order of nature, the husband might have been the father of the child if sexual intercourse did then take place, such intercourse is to be presumed, and it is incumbent on those who dispute the legitimacy of the child to disprove the fact of such intercourse having taken place by evidence affording an irresistible presumption that it could not have taken place, and not by mere evidence of circumstances which may afford a balance of probabilities against the fact. Per Sir J. Leach, M. R., *Head v. Head*, 1 Sim. & Stu. 152., S. C. affirmed, 1 Turner, 139.; and see *Banbury peerage case*, 1 Sim. & Stu. 153. If a husband have access, and others at the same time are carrying on a criminal intercourse with his wife, a child born under such circumstances is legitimate. But if the husband and wife are living separately, and the wife is notoriously living in open adultery, the mere fact that the husband has opportunities of access, is not conclusive evidence of legitimacy. Such a state of things rather tends to rebut the presumption of intercourse. Per Alderson, J., in *Cope v. Cope*, 5 C. & P. 604., S. C., 1 M. & Rob. 269.; and see the comments on this case in *R. v. Mansfield*, 1 Q. B. 444. In case of a separation *à mensâ et thoro*, the children born during that period will be bastards, unless access be proved. *St. George and St. Margaret*, 1 Salk. 123. Neither husband nor wife will be permitted to prove the non-access; *R. v. Sourton*, 5 A. & E. 180.; *antè*, p. 434.; but she is competent, upon an order of bastardy, to prove the fact of her connection with the person whom she charges as being the real father of her child. *R. v. Luffe*, 8 East, 203. In an action to try the legitimacy of a party born of a married woman since dead, her declarations that he was not the son of her husband, but of another man, are not admissible; nor are such declarations of the husband. *Cope v. Cope*, *suprà*.

Proof of a will.] Defendant may defeat the claim of the heir by showing a will. The proof of the due execution of a will, has been already treated of, *antè*, p. 95., *et seq.*

Where the lessor of the plaintiff claimed as heir-at-law, and defendant relied on a will, Lord Denman, C. J. allowed the plaintiff to prove in reply a subsequent will devising the land to the lessor of the plaintiff; for such a will operates only as a revocation of the first, and leaves the plaintiff entitled as heir. *Doe v. Gosley*, 2 M. & Rob. 243. Since

31st December 1833, the heir-at-law would take as devisee under such a will ; see next head.

As to the right to begin upon a trial of ejectment to the validity of a will, see *antè*, p. 177, 178.

By Devisee of a Freehold Interest.

Where the lessor claims a freehold interest by devise, he must prove: (1) The seisin in fee of the testator (see *antè*, p. 433.), or that he was "entitled;" see 7 Wm. 4. & 1 Vict. c. 26. s. 3.: (2) The regular execution of the will; see *antè*, p. 95., *et seq.*: (3) The death of the testator; and (4) in case there are any estates limited by the will prior to the devise to himself, the determination of such estates.

By 3 and 4 Wm. 4. c. 106. s. 3., when land, &c. shall be devised by any testator who died since the 31st of December, 1833, to his own heir, such heir shall be considered as taking by devise and not by descent. Before this act, a devise to any one of the *same estate* which he would otherwise have taken as heir-at-law of the devisor, was inoperative, and the devisee took by descent and not by devise.

Defence.

The defendant may impeach the will by showing that it is a forgery, or has been obtained by fraud or duress; *Doe v. Allen*, 8 T. R. 147.; or by proving the incapacity of the testator to make a will; or a revocation of it; or a disclaimer to take under it. *Begbie v. Crook*, 2 New Ca. 70. But where the devisee of an estate refused to take it as devisee, saying he was entitled as heir-at-law, and would not accept any benefit by the will of the devisor, it was held that this was no such a disclaimer as prevented him from afterwards bringing ejectment, and relying on his title as devisee. *Doe v. Smyth*, 6 B. & C. 112.

Forgery.] To impeach the will on this ground, declarations of intention, &c. by the testator are admitted, and other collateral circumstances may be proved to show the improbability of its genuineness; *antè* p. 13.; *Doe v. Allen*, 8 T. R. 147.

Incapacity from infancy or coverture.] Both before and since 7 Wm. 4. and 1 Vict. c. 26., an infant under twenty-one years of age was and is disqualified from making a will. See 34 and 35 Hen. 8. c. 5. s. 14., and the last act, s. 7. Nor can a *feme covert* make one except under a power, or where her husband has abjured the realm, or is otherwise civilly dead. *Co. Litt.* 133. a.

Incapacity from idiocy, or non-sane memory.] It is not enough that the testator, when he makes his will, has sufficient memory to answer familiar and usual questions; but he ought to have a disposing memory so as to be able to make a disposition of his lands with understanding and reason. *Marquis of Winchester's case*, 6 Rep. 23. a. If the defendant succeeds in proving that the testator has been affected by habitual derangement, then it is for the other party who claims under the will to show sanity and competency at the period when the act was done. *Atty.-Gen. v. Parnther*, 3 Br. C. C. 441. But where there is a temporary delirium arising from transient causes, as fever,

&c., slight evidence of restored sanity will be sufficient. *Brogden v. Brown*, 2 *Add. Rep.* 445. The will itself may be evidence of a sound mind, or lucid interval; and one made by a person confined in an asylum has been established by the reasonableness of its provisions. *McAdam v. Walker*, 1 *Dow.* 178.; Accord. *Cartwright v. Cartwright*, 1 *Phill.* 90. Where the evidence is conflicting, the safest course is to try the question by the evidence of collateral facts; as by correspondence, acts done with relation to property, and the circumstances attending the preparation and execution of the will itself. *Tatham v. Wright*, 2 *Russ. & Myl.* 21, 22.

Letters written to the testator, and not acted upon, or indorsed, or answered by him, are not admissible evidence of his sanity. *Wright v. Doe (on error)*, 4 *New Ca.* 489.

Imbecility produced by age or sickness, of which the devisee has taken advantage, will be enough to avoid a will. 1 *Will. on Exors.* p. 31.; *Hacker v. Newborn*, *Style.* 427.; *Money Penny v. Brown*, 8 *Viner*, 167. But not mere age or weakness of intellect; see the authorities, 1 *Will. on Exors. ubi supra.*

Revocation of will by a subsequent one under Stat. Frauds.] Under the Statute of Frauds, the defendant may show the will revoked "by some other will or codicil in writing." Such second will, to operate as a revocation, must be executed according to the requisitions of the 5th section of the statute. *Eccleston v. Petty, Carth.* 80. If the second devise do not expressly revoke, it revokes only as far as it is clearly inconsistent with the former devise. *Harwood v. Goodright, Coup.* 87. Where a devise in a will is clear, it is incumbent on those who contend that it is not to take effect by reason of a revocation in the codicil, to show that the intention to revoke is as clear and free from doubt as the intention to devise. A. devised a certain copyhold messuage to trustees upon trust for his wife during her life or widowhood; or until she should cease to reside at the same premises, or let the same, &c. In the event of her death, second marriage, ceasing to reside, &c., he directed the trustees to be seised of the premises upon the same trust as would best correspond with the uses declared concerning the residue of his real estate. The testator also devised to her money in the funds and household goods during such time as, by virtue of his will, she should be entitled to the copyhold. The testator made five codicils to his will, in all of which his wife appeared to be the object of his peculiar bounty and regard. The fourth codicil was as follows: "I do make and add this fourth codicil to my will, hereby revoking and making null and void several of the dispositions heretofore made by me in my said will and codicil of all my freehold, copyhold, and personal estate and effects, and instead and in place of such devise, disposition, and bequest, I give, devise, and bequeath all my freehold, copyhold, and personal estate to my daughter," with remainder over. It was held that the devise in this codicil was confined to the property which formed the testator's residue, and that the copyhold estate to the wife remained unrevoked. *Hearle v. Hicks*, 1 *Clark and F.* 20.

Revocation of will by other writing.] By the 6th section of the statute of Frauds a will may also be revoked "by some other writing of the deviser, signed in the presence of three or four witnesses, de-

claring the same." The statute does not require the witnesses to subscribe or attest the writing in the presence of the deviser, or indeed to subscribe it at all. *Townsend v. Pearce*, 8 Vin. Ab. Devise, p. 142. A codicil, whereby the testator confirms his will, does not give validity to an unattested alteration in a devise of lands made after the execution of the will, nor to a testamentary paper purporting to be a devise of lands unattested and unannexed to the will, and not referred to by such codicil. *Utterton v. Robins*, 1 A. & E. 423.

Revocation of will by cancelling, &c.] By the same section of the statute of Frauds a will may be revoked "by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence and by his directions and consent." The act must be done with an intention of revoking; and though the burning or tearing be partial or incomplete, yet, if done with an intention to revoke, it will operate as a revocation. *Bibb v. Thomas*, 2 W. Bl. 1043.; *Winsor v. Pratt*, 2 B. & B. 650. Where the testator threw his will on the fire with intent to destroy it, and another person snatched it off before more was burnt than the corner, and afterwards promised the testator that he would burn it, and pretended to have done so, this was held no revocation. *Doe v. Harris*, 6 A. & E. 209. But it was held otherwise in the case of copyhold. *S. C.* 8 A. & E. 1. It is a question of fact for the jury, whether the testator had completed the intended act of revocation. *Doe v. Perkes*, 3 B. & A. 489. The declarations of the testator at the time of doing the act, and his subsequent declarations respecting it, are admissible evidence of his intentions. *Burtonshaw v. Gilbert*, Cowp. 53., and 2 East, 534. note (b).

Implied revocations.] Implied revocations were considered as excepted out of the statute of Frauds. They took place, (1.) Where a subsequent disposition of the property was made by the testator inconsistent with the will; *Coke v. Bullock*, Cro. Jac. 49.: (2.) Where the seisin of the testator was altered by some conveyance between the date of the will and his death. This might operate as a total or partial revocation according to circumstances, and could not be rebutted by proof of a contrary intention. *Goodtitle v. Olway*, cited, *antè*, p. 19.: (3.) Where there had been a material change in the circumstances of the testator since the publication of the will. Thus the subsequent marriage of the testator and the birth of a child, without provision made for them, were held to operate as an implied revocation. *Doe v. Lancashire*, 5 T. R. 58. It was a disputed question whether parol evidence was admissible to rebut the implication; but in *Marston v. Roe*, 8 A. & E. 14., such evidence was held (on error in the Exchequer Chamber) to be inadmissible; and the implication is not prevented by a provision in the will for a future wife only, without providing for the children; although such children have in fact been provided for by the descent of property acquired by the testator after the date of the will. *S. C.*

Revocation of will under the last Statute of Wills.] By 7 Wm. 4. & 1 Vict. c. 26. (which applies to wills made or republished since the 31st December, 1837), section 18., no will or codicil or any part thereof shall be revoked otherwise than by another will or codicil executed in the manner required by section 9.; (*antè*, p. 98.); or by some writing

executed in like manner ; or by burning, tearing, or otherwise destroying it by the testator or some person in his presence, and by his direction, with the intention of revoking the same.

By section 21., a will shall be revoked by marriage, except a will made under a power, when the property would not, in default of appointment, go to the representatives of the testator.

By section 19., no will shall be revoked by any presumption of intention on the ground of alteration of circumstances.

By section 23., no conveyance or other act subsequent to the execution of the will (except an act by which a will may be revoked as above) shall prevent the operation of the will with respect to such estate or interest as the testator shall have power to dispose of by will at the time of his death.

By section 24., every will shall take effect as if executed immediately before the death of the testator, unless a contrary intention appear by the will.

By section 21., no obliteration, interlineation, or alteration, made after execution, shall have any effect (except so far as the words before alteration shall not be apparent) unless such alteration be executed in the manner required for a will ; but the will, with such alteration, shall be deemed duly executed if the signature of the testator and subscription of the witnesses be made in the margin or on some other part, opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to it, and written at the end or other part of the will.

By section 22., a will revoked can only be revived by re-execution, or by a codicil duly executed and attested and showing an intention to revive it ; and where a will partly revoked, and afterwards wholly revoked, shall be revived, the revival shall not extend to so much as was revoked before the revocation of the whole, unless a contrary intention appears.

By Devisee of a Leasehold Interest.

A devisee of a leasehold interest must prove : 1. The title of the devisor to the leasehold property, unless the defendant be estopped from disputing it ; 2. The probate of the will ; and 3. The assent of the executor to the bequest.

By the assent, the term is vested in the devisee from the death of the testator. *Saunders's case*, 5 Rep. 12. b. ; *Doe v. Guy*, 3 East, 120. A very small matter will amount to an assent, it being a rightful act. *Noel v. Robinson*, 1 Vern. 94. ; *Doe v. Mabblerley*, 6 C. & P. 126.

By Devisee or Heir of Copyhold.

A devisee of copyhold premises must, at common law, adduce the following proofs :

1. The seisin of the testator. The surrender by the testator to the use of his will is no proof of his seisin ; *per* Taunton J., in *Barfoot v. Sadler*, *Winton Sum. Ass.* 1831.

2. The surrender by him to the use of his will. As between surrenderor and surrenderee, a presentment on the court rolls of an admittance, as upon a surrender out of court, is primary evidence of the

surrender without producing the original surrender and without regard to the stamp upon it. *Doe v. Olley*, 12 A. & E. 481.

3. The will itself. This, before the late statute, need not, it is said, have been in writing. 1 *Walk. Cop.* 130. A recital of it in the admittance is not evidence as between heir and devisee. *B. N. P.* 108. Nor is the probate admissible evidence of it. *Archer v. Slater*, 11 *Sim.* 507. Wills of customary and copyhold land must now be executed with the same formalities as freehold; 7 *Wm. 4.*, and 1 *Vict. c. 26.*, s. 1., *anté*, p. 98.; and a will so executed is now good, though the testator may not have surrendered to the use of his will; and though, being entitled as heir, devisee or otherwise, he may not have been admitted; and though there may be no custom, or only a limited custom, to devise or surrender to the use of a will; sect. 3.

4. The devisee must prove his own admittance, though an heir may bring ejectment without it.

By 4 & 5 *Vict. c. 35.* (the act for the commutation of manorial rights, &c.) sect. 86., a customary court may (after 31st December 1841) be held without the presence, or even the existence, of any copyholder; and by s. 88., the lord, his steward or deputy-steward, may admit at any time or place within or out of the manor, and without holding any court; and by sect. 90. no presentment of such admittance is necessary. By sect. 89. the lord, &c., is compellable to enrol a copy of any will or codicil delivered to him, and the entry on the rolls shall be taken to be made in pursuance of a presentment by the homage.

The late statute, 3 & 4 *Wm. 4.*, c. 106., amending the law of inheritance, extends to copyhold and customary land. *Anté*, p. 433.

Proof of Admittance.] Although in ejectment against a stranger the heir of the copyholder (*Doe v. Hellier*, 3 *T. R.* 169., *Roe v. Hicks*, 2 *Wils.* 13.), or the grantee of the reversion of a copyhold from the lord, (*Doe v. Loveless*, 2 *B. & A.* 453.), need not prove an admittance, yet a devisee, being a purchaser, must prove his admittance. The admittance of tenant for life being the admittance of him in remainder (*Auncelme v. Auncelme*, *Cro. Jac.* 31.), a devisee in remainder has only to prove the admittance of the tenant for life, and not his own admittance. The title of a surrenderee is not complete before admittance, which he must prove; but after admittance his title has relation to the time of surrender against all persons but the lord; and he may therefore recover in ejectment upon a demise laid between the time of the surrender and admittance, provided the admittance be before the trial. *Doe v. Clapham*, 1 *T. R.* 600.; *Doe v. Hall*, 16 *East*, 208. A person, to whom an original grant of a copyhold is made by the lord, is tenant before admittance. *Doe v. Whitaker*, 5 *B. & Ad.* 409. An heir may, before admittance, devise copyholds descending to him. *King v. Turner*, 1 *Mylne & K.* 456. But not an unadmitted devisee or surrenderee (before the late act); *per curiam* in *Doe v. Lawes*, 7 *A. & E.* 211., 213. Where an admittance was entered at a void court, and the proceedings of that court regularly entered by the steward on the court rolls, it was held sufficient; as at the following court the tenants would have information of it. *Doe v. Whitaker*, 5 *B. & Ad.* 409.

As to proof of surrender and admittance by the court rolls, or copy of the court rolls, of the manor, see *anté*, p. 80., 146. The identity of the parties named in the rolls must be proved. *Doe v. Smith*, 1 *Camp.* 197.

By Mortgagee.

If the action be brought against the mortgagor in possession after default, the mortgagee has only to prove the execution of the mortgage deed; and a demand of possession is unnecessary. *Doe v. Maisey*, 8 B. & C. 767.; *Doe v. Giles*, 5 Bing. 421. And the mere fact of the receipt of interest, as such, since the date of the demise, is no recognition of a lawful possession by the mortgagor or his tenant, so as to make a demand necessary. *Doe v. Cadwallader*, 2 B. & Ad. 473. But if the mortgagee treats one, who occupies under a demise by the mortgagor since the mortgage, as his tenant, a notice may become necessary. *Rogers v. Humphreys*, 4 A. & E. 313, 314.; *Doe v. Hales*, 7 Bing. 322. Notice by mortgagee to the mortgagor's tenant in possession will not alone create a tenancy between them without attornment. *Evans v. Elliot*, 9 A. & E. 342. But if such notice is not repudiated, it may be evidence of a yearly tenancy at the former rent from the date of the notice. *Semb.*, *Brown v. Storey*, 1 M. & G. 117. An agreement that the mortgagor may continue to hold till a certain day fixed for payment operates as a re-demise till that day. *Wilkinson v. Hall*, 3 New Ca. 508. So where the agreement is to hold till default in payment of an annuity. *Doe v. Goldwin*, 2 Q. B., 143. See also *Doe v. Day*, *ib.* 147. But where it was agreed that the mortgagor should pay rent to the mortgagee during his occupation, provided such reservation should not prejudice the mortgagee's right to enter and evict upon default, it was held that the mortgagee might eject without notice to quit, though he had distrained for a year's rent. *Doe v. Olley*, 12 A. & E. 481.

In ejectment by mortgagee against the assignee (under the Lords' Act) of mortgagor, a letter written by the mortgagor to the plaintiff before the assignment is evidence against the defendant; and it shall be presumed to be written at the time of its date. *Doe v. Milburn*, 2 M. & W. 853.

If a third person is in possession by a title prior to the mortgage, the plaintiff must show a title to oust him. Thus, if he be a tenant from year to year who came in prior to the mortgage, the lessor of the plaintiff must prove a regular notice to quit. *Doe v. Belcher*, 3 East, 449. But the defendant, being either the mortgagor or one claiming under him, cannot set up a title in a third party prior to the mortgage. *Doe v. Vickers*, 4 A. & E. 782.; *Doe v. Clifton*, *ibid.* 809.

A mortgagee of turnpike tolls cannot recover in ejectment, unless the power to mortgage includes the toll houses and gates. *Doe v. Gilbert*, 2 T. R. 169.; *Doe v. Lediard*, 4 B. & Ad. 137. And trustees are not estopped from setting up their want of authority. *Doe v. Gilbert*, *supra*. A power given to a railway company to mortgage "the undertaking, with all tolls," &c., will not enable the mortgagee to recover the railway in ejectment. *Doe v. St. Helen's Railway Co.*, 2 Q. B. 364.

In order to prove the execution of a mortgage by the trustees of a turnpike road, it is enough, under the General Turnpike Act 3 G. 4. c. 126. s. 134., to shew that the trustees acted as such, and that there was an order for their appointment, without shewing the actual appointment. *Doe v. Hares*, 4 B. & Ad. 435.

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As to the date of the demise, see *ante*, p. 412. As to effect of Statute of Limitations in the case of mortgages, see *post*, *Defence*, p. 452.

By Execution Creditor.

Tenant by elegit must prove : 1. The judgment ; 2. The elegit issued upon it ; and, 3. The inquisition and return thereupon. *B. N. P.* 104.

An examined copy of the judgment roll, containing the award of elegit and the return of the inquisition, is sufficient, without proving a copy of the elegit and of the inquisition. *Ramsbottom v. Buckhardt*, 2 *M. & S.* 565. So the original writ of elegit is admissible, though there may be no award on the judgment roll. *Pack v. Tarpley*, 9 *A. & E.* 468. If the sheriff's return do not state that he has set out a moiety by metes and bounds, it is bad, and the objection may be taken at the trial. *Fenny v. Durrant*, 1 *B. & A.* 40. Although a third person be in possession of the land extended, it is sufficient to prove a *prima facie* title in the debtor ; and it lies upon the tenants in possession to shew that their title is anterior to the judgment. *Doe v. Owen*, 2 *C. & J.* 71.

Where the lessor of the plaintiff is vendee of the sheriff under a *fi. fa.*, it is sufficient for him, in ejectment against the defendant in the first action, to produce the *fi. fa.*, without proving the judgment. But it is otherwise as against a stranger. *Doe v. Murless*, 6 *M. & S.* 110. Where the sheriff's vendee is also the plaintiff at whose suit the writ was issued, and not a mere stranger, he must also prove the judgment ; for he is privy to it, and if there be none the writ would be a nullity as against him. *Doe v. Smith, Holt*, *N. P. C.* 589. *S. C.* 2 *Stark.* 199.

A sale by the sheriff without a written assignment passes no property, and the estate remains in the debtor, who may therefore eject the creditor in possession. *Doe v. Jones*, 9 *M. & W.* 372.

The confession in the consent rule does not preclude the defendant from setting up, by way of defence, that the land is held on a public trust, and is therefore exempt from seizure under execution. *Doe v. Roe*, 1 *Q. B.* 700.

By Guardian.

In ejectment by a guardian in socage, the lessor of the plaintiff must prove the seisin of the ancestor of the heir ; that he has left an heir, who is under the age of fourteen ; and that, among the relations to whom the inheritance cannot descend, he himself is the next of blood to such heir. The late act for amending the law of descent, by making lineal ancestors and others capable of inheriting, who could not before have succeeded as heirs, will hereafter make it difficult to find such a relation. It seems necessary to prove that the heir was under the age of fourteen at the time of the demise laid in the declaration. 2 *Phill. Ev.* 250. ; *Doe v. Bell*, 5 *T. R.* 471.

In ejectment by a guardian appointed by deed or will according to 12 Car. 2. c. 24. s. 8, 9., the title of the deceased father must be proved ; the minority of the ward at the time of the demise laid in the declaration ; and the due execution of the will or deed. 2 *Phill. Ev.* 251. Where the appointment is by will, it must now be executed agree-

ably to s. 9. of 7. Wm. 4., and 1 Vict. c. 26. *Vide antè*, "*Proof of Wills*," p. 98.

By Executor or Administrator.

In ejectment by an executor or administrator, the lessor of the plaintiff must prove: 1. The leasehold title of his testator; 2. The testator's death; 3. The probate or grant of administration.

The leasehold title may be shewn by producing and proving the lease in the usual way; see *antè*, p. 87.

The death of the testator is proved by parol evidence; or by proof of the register of burial and identity of the party deceased. See *antè*, p. 26., 84., 146., 150. The probate or letters of administration are not of themselves evidence of the decease; *antè*, p. 142.

As to proof of the probate or grant of administration, see *antè*, p. 81.

Administration when granted is said to relate back to the intestate's death. *Com. Dig. Administration* (B. 10.). And this doctrine of relation is supported by *Tharpe v. Stallwood*, 1 Dowl. & L. 24., and *Patten v. Patten*, 1 Alc. & Nap. 493. But the contrary was laid down in *Woolley v. Clark*, 5 B. & A. 745. In 3 & 4 Wm. 4. c. 27. s. 6. (*post*, p. 446.) administration is expressly made to relate back to the death for the purposes of that act.

The term is vested in the executor from the death of the testator, and the executor may therefore recover on a demise laid between the time of the testator's death and of the probate. *Com. Dig. Administration*, (B. 10.)

By Parson.

In ejectment by a parson for the recovery of the parsonage-house, glebe, or tithes, where he does not claim in the character of landlord, or where the defendant is not otherwise estopped from disputing his title, he must show his title by proving presentation, institution, and induction; but he need not prove title in the patron. *Heath v. Pryn*, 1 Vent. 14.; *B. N. P.* 105. If the presentation was by parol, it may be proved by a person who was present and heard it. *R. v. Eriswell*, 3 T. R. 723. But a presentation by a corporation must be in writing under the common seal; *Gib. Codex*, 794., and must therefore be proved by proof of the seal; *antè*, p. 87. The institution may be proved by the letters testimonial of institution, or by the official entry in the public registry of the diocese, which ought regularly to record the time of the institution, and on whose presentation; *ibid*, 813.; in which case it would seem to be evidence of the presentation as well as of the institution. 2 *Phill. Ev.* 257. So the letters of institution of a party reciting the cession of his predecessor, followed by induction, are sufficient evidence of the cession. *Doe v. Carter*, R. & M. 238. The induction may be proved either by some person who was present at the ceremony, or by the indorsement on the mandate directed by the ordinary to the archdeacon, or by the return to the mandate, if a return has been made. 2 *Phill. Ev.* 257.; *Chapman v. Beard*, 3 *Anst.* 942. The lessor of the plaintiff will not be required to prove that he has taken the requisite oaths, or declared his assent to the book of

common prayer according to the act of uniformity. *Powel v. Milbank*, 2 W. Bl. 851. ; Accord. 3 East, 199. Some evidence must be given that the property to be recovered is church property ; as that the premises were occupied by a former incumbent, &c. 2 Phill. Ev. 258. The parson may bring ejectment against a tenant from year to year of the glebe land, though the current year of the tenancy created by his predecessor is unexpired, and no notice to quit has been given. *Doe v. Carter*, R. & M. 237.

Defence to Ejectment, generally.

The common consent rule binds the defendant to admit every thing stated in the declaration, except the title of the lessor of the plaintiff. His only defence, therefore, is to show, under the general issue, that the plaintiff had no such title as gave him a right of entry at the time at which the demise is alleged to have been made to the nominal plaintiff. The new rules of pleading do not touch this form of action.

When the defendant in ejectment has a right to begin, see *ante*, p. 177.

Where a party defends an ejectment as landlord, and the occupiers of the premises have suffered judgment by default, he cannot object that they have not received notice to quit from the lessors of the plaintiff. *Doe v. Creed*, 5 Bing. 327. But where A. defends as landlord and B. as tenant, B. is not precluded from shewing an outstanding tenancy under the joint demise of the lessor of the plaintiff and A., who were tenants in common. *Doe v. Horn*, 3 M. & W. 333. One who defends as landlord cannot rely upon any title which the tenant would be estopped from setting up. *Doe v. Smythe*, 4 M. & S. 347.

A defendant in ejectment under the usual consent rule cannot insist that a verdict shall be entered for him as to part of the premises. The plaintiff has a general verdict, and takes possession at his peril. *Doe v. Rhodes*, 11 M. & W. 600.

Statute of Limitations.] The period of limitation in the action of ejectment was formerly governed by the 21 Jac. 1. c. 16., but now by the 3 & 4 W. 4. c. 27., which specifies in detail the various periods at which, in different cases, the statute shall begin to operate, and the manner in which, by the acknowledgment of the party, its operation may be prevented. In the following extracts from it, the sections are not to be taken as transcribed *verbatim*, except where inverted commas are used.

The first section is an interpretation clause, and provides, that except where the context excludes such construction, the words used in the act are to be interpreted as follows :

Land, — means manors and all corporeal hereditaments, and tithes (other than tithes belonging to spiritual or eleemosynary corporations sole), whether freehold, chattel, copyhold, or of any other tenure.

Rent, — means heriots and all suits and services for which distress lies, annuities and periodical sums charged on land (except moduses and corporations belonging to such sole corporations as above).

Person through whom another claims, — means the person by, through, under, or by the act of whom, the claimant is entitled, as heir,

issue in tail, tenant by courtesy and in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and any person entitled to an estate or interest to which the claimant became entitled, as lord by escheat.

Person, — means any body politic, corporate, or collegiate, or a class of creditors, or other persons, as well as an individual; and every word importing the singular number shall extend to several persons or things as well as one; and every word importing the masculine gender only shall extend to a female as well as a male.

Sect. 2. *No Land or Rent to be recovered but within twenty years after the Right of Action accrued to the Claimant or some Person whose Estate he claims.*] “After the 31st of December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or

“If such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same.

Sect. 3. *When the Right shall be deemed to have accrued.*] “The right to make an entry or distress or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned, that is to say:

“When the person claiming such land or rent, or some persons through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession, or receipt, *then* such right shall be deemed to have first accrued at the time of such dispossession, or discontinuance of possession, or at the last time at which any such profits or rent were or was so received.

“When the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, *then* such right shall be deemed to have first accrued at the time of such death.

“When the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, *then* such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument.

“When the estate or interest claimed shall have been an estate or

interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, *then* such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession.

"When the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, *then* such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken."

Sect. 4. *Where Advantage of Forfeiture is not taken by Remainderman, he shall have a new Right when his Estate comes into Possession.*] When any right to make an entry, &c., by reason of any forfeiture or breach of condition shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry, &c., shall be deemed to have first accrued when the estate or interest shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened.

Sect. 5. *Reversioner to have a new Right.*] A right to make an entry, &c. shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession by the determination of any estate in respect of which the land shall have been held, or the rent received, notwithstanding the person claiming such land, shall, at any time previously to the creation of the estate which shall have determined, have been in possession, or in receipt of such rent.

Sect. 6. For the purposes of the act an administrator, claiming the estate or interest of the deceased, shall be deemed to claim as if there had been no interval of time between the death and the grant of the letters of administration.

Sect. 7. *In the case of a Tenant at Will, the Right shall be deemed to have accrued at the end of one Year.*] When any person shall be in possession, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, to make an entry, &c. shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: Provided always, that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee.

Sect. 8. *No Person, after a Tenancy from Year to Year, to have any Right but from the end of the first Year or last Payment of Rent.*] When any person shall be in possession, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, to make an entry, &c., shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent

payable in respect of such tenancy shall have been received (which shall last happen).

Sect. 9. Where Rent amounting to 20s., reserved by a Lease in Writing, shall have been wrongfully received, no Right to accrue on the Determination of the Lease.] When any person shall be in possession, or in receipt of any rent, by virtue of a lease in writing, by which a rent of twenty shillings or upwards shall be reserved, and the rent reserved shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, to make an entry, &c. after the determination of the lease, shall be deemed to have first accrued at the time at which the rent reserved was first so received by the person so wrongfully claiming; and no such right shall be deemed to have first accrued upon the determination of the lease to the person rightfully entitled.

Sect. 10. That no person shall be deemed to have been in possession of any land within the meaning of this act merely by reason of having made an entry thereon.

Sect. 11. No continual or other claim upon or near any land shall preserve any right of making an entry or distress or of bringing an action.

Sect. 12. Possession or receipt of more than his share by one coparcener, joint-tenant, or tenant in common, for his own benefit or that of a third person, shall not be deemed to be the possession, &c. of his coparceners, &c.

Sect. 13. Possession or receipt by a younger brother or relation of an heir shall not be deemed to be the possession or receipt of by the heir.

Sect. 14. Acknowledgment in writing given to the Person entitled, or his Agent, to be equivalent to Possession or Receipt of Rent.] When any acknowledgment of the title of the person entitled shall have been given to him or his agent in writing signed by the person in possession or in receipt of the profits or rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed to have been the possession or receipt of or by the persons to whom such acknowledgment shall have been given, and the right of such last-mentioned person to make an entry or distress or bring an action, shall be deemed to have first accrued at the time at which such acknowledgment, or the last of such acknowledgments, was given.

Sect. 15. Where Possession is not adverse at the Time of passing the Act, the Right shall not be barred until the end of Five Years afterwards.] When no such acknowledgment shall have been given before the passing of this act, and the possession or receipt of the profits or the rent, shall not at the time of passing of this act (*i. e.* on 24th July, 1833)

have been adverse to the right or title of the person claiming to be entitled thereto, then such person may, notwithstanding the period of twenty years shall have expired, make an entry or distress or bring an action at any time within five years next after the passing of this act.

Sect. 16. *Persons under Disability of Infancy, Lunacy, Coverture, or beyond Seas, and their Representatives, to be allowed Ten Years from the Termination of their Disability or Death.*] If at the time at which the right of any person to make an entry, &c., shall have first accrued such person shall have been under any of the following disabilities, (that is to say,) infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then such person may, notwithstanding the period of twenty years shall have expired, make an entry, &c., at any time within ten years next after the time at which the person to whom such right first accrued shall have ceased to be under any such disability, or shall have died (which shall have first happened).

Sect. 17. provides that the entry, distress, or action shall be made or brought at all events within forty years after the right accrued, although the disability may have continued during the whole of that time.

Sect. 18. provides that when any person shall be under any of the above disabilities at the time at which his right first accrued, and shall die under such disability, no time beyond the period of twenty years next after the right first accrued, or the period of ten years next after his death, shall be allowed by reason of any disability of any other person.

Sect. 19. provides that no part of the United Kingdom, nor the Islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent, shall be deemed to be beyond seas within the meaning of the act.

Sect. 20. *When the Right to an Estate in Possession is barred, the Right of the same Person to future Estates shall also be barred.*] When the right of any person to an estate or interest in possession shall have been barred by the determination of the period limited in such case, and he shall at any time during the said period have been entitled to any other estate, interest, right, or possibility, in reversion, remainder or otherwise, in the same land, &c., no entry, &c., shall be made by him, or any person claiming through him, in respect of such other estate, &c., unless in the mean time such land, &c., shall have been recovered by some person entitled to an estate, limited or taking effect after, or in defeasance of, the estate or interest in possession.

Sect. 21. When tenant in tail is barred by this statute, all persons whose estate he might have barred, are also precluded from their entry, distress, or action.

Sect. 22. *Possession adverse to a Tenant in Tail shall run on against the Remainderman whom he might have barred.*] When a tenant in tail,

entitled to recover the land, shall have died before the expiration of the period applicable to such case, no person claiming any estate which such tenant in tail might lawfully have barred, shall make an entry, &c. but within the period during which, if such tenant in tail had continued to live, he might have made such entry, &c.

Sect. 23. *Where there shall have been Possession, under an Assurance by a Tenant in Tail, which shall not bar the Remainders, they shall be barred at the end of Twenty Years after the time when the Assurance, if then executed, would have barred them.]* When a tenant in tail shall have made an assurance, which shall not operate to bar an estate to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance, be in possession of such land, &c., and the same person, or any other person whatsoever (other than some person entitled to such possession in respect of an estate which shall have taken effect after or in defeasance of the estate tail), shall continue in such possession for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, would, without the consent of any other person, have operated to bar such estate then at the expiration of such period of twenty years the assurance shall be effectual against any person claiming any estate, &c., to take effect after or in defeasance of the estate tail.

Sect. 29. No lands or rents are to be recovered by ecclesiastical or eleemosynary corporations sole but within two incumbencies, and six years, or sixty years.

Sect. 34. *The right of the party out of possession extinguished.]* At the determination of the period limited by the act for making an entry or distress, or bringing any action, the right and title to the land, rent, or advowson for the recovery whereof an entry, distress, or action might have been made or brought within such period, shall be extinguished.

Sect. 35. *Receipt of Rent to be deemed Receipt of Profits.]* "That the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this act."

Sect. 39. No descent cast, discontinuance, or warranty after the 31st December, 1833, shall toll or defeat any right of entry or action.

Cases that occurred before the above statute.] In order to render the statute of limitations, 21 Jac. 1., a bar in ejectment, the defendant must have proved an adverse possession for twenty years. The words, "adverse possession" are not in the statute; but the doctrine is a consequence of it. The statute forbids an entry, except within twenty years after the right first accrued. If, therefore, the person out of possession has by contract, &c., precluded himself from entry, the statute does not apply. So also it cannot apply where the party already has that which the statute was intended to give, i. e., actual or

constructive possession. Hence it only operates as a bar where another is in possession without the consent or contract of the person entitled to a present right of entry. There is no adverse possession in the following cases :

1. Where the possession of the occupier is the possession of the lessor of the plaintiff ; as, formerly, where a younger son entered by abatement on the death of his father and died seised, this possession was not adverse to the title of his elder brother. *Co. Litt.* 243. *a.* So the possession of one copartner, joint-tenant, or tenant in common, was not adverse to the title of his co-tenant ; *Ford v. Grey*, 6 *Mod.* 44. ; *Doe v. Hulse*, 3 *B. & C.* 757. ; unless there had been an actual ouster, see *antè*, p. 416. But the law is now altered in both these instances by the late statute. Sections 12. and 13., *suprà*, p. 447.

2. There is no adverse possession where the estate of the party in possession, and that of the lessor of the plaintiff, form parts of one and the same estate. Thus the possession of the particular tenant is never adverse to the title of him in remainder or reversion. *Taylor v. Horde*, 1 *Burr.* 60. ; *Fisher v. Prosser*, *Cowp.* 218. See also *Doe v. Brightwen*, 10 *East*, 583. Where the relation of landlord and tenant can be implied, the statute will not run ; *Roe v. Ferrars*, 2 *B. & P.* 542. ; nor where the party in possession is tenant at sufferance. *Doe v. Hull*, 2 *D. & R.* 38.

3. There is no adverse possession where the relation of trustee and cestui que trust subsists between the parties. *Keene v. Deardon*, 8 *East*, 248. Nor between mortgagor and mortgagee, unless there be a renunciation or other adverse holding commenced by the mortgagor. *Doe v. Williams*, 5 *A. & E.* 291. 296. ; *Hall v. Doe*, 5 *B. & A.* 687.

Where a jointress for life married again and joined her second husband in levying a fine, who survived her and held the land twenty years, this was held a bar to ejectment by the reversioner, though the fine was void. *Doe v. Gregory*, 2 *A. & E.* 14. Declarations of the deceased occupier against his interest, tending to show his possession not to be adverse, are admissible. *Doe v. Harbrow*, 3 *A. & E.* 67. The vendee of land who is let into possession, but has never completed the purchase, has no adverse possession as against his vendor ; *Doe v. Edgar*, 2 *New Ca.* 498. ; unless he refuses to give up possession or to pay interest on the purchase money. *S. C. id.* 502, 503. Upon the expiration of a lease for lives the lessor granted another lease ; at this time W. was in possession and continued so for twenty years, claiming to hold under the first lease on the ground that it was still subsisting ; held that his possession under such claim was not adverse. *R. v. Arbridge*, 2 *A. & E.* 520.

If a cottage be built on the lord's waste in defiance of him, twenty years' undisturbed possession of such cottage will be a bar to him. But if built at first with the lord's permission, or if any acknowledgment has been since made, the statute will not run. Thus where the defendant had inclosed a small piece of waste land by the side of a highway, and had occupied it for thirty years without paying any rent, but at the expiration of that time the owner of the adjoining land demanded 6*d.* rent, which the defendant paid on three several occasions, it was held that these payments, in the absence of other evidence, were conclusive to show that the defendant's occupation began by permission of the owner of the adjoining land. *Doe v. Wilkinson*, 3 *B. & C.*

413.; accord. *Doe v. Clark*, 8 B. & C. 717. It appears not to be decided whether twenty years' possession of premises, which a lessee has gained by encroachment on the lessor's adjoining waste, will be a bar to an ejectment brought for such premises by his lessor after the expiration of the tenancy. *Perryn B.*, and *Heath and Buller Js.*, are said to have ruled that the lessor was entitled to recover; see *Doe v. Davies*, 1 Esp. 461.; *Graham B.*, in *Bryan v. Winwood*, 1 Taunt. 208.; and *Parke B.*, in *Doe v. Rees*, 6 C. & P. 610.; and see *Doe v. Fuller*, 1 Tyr. & Gr. 17. On the other hand, *Lord Kenyon* laid it down that if a tenant incloses part of a waste, and is in possession thereof so long as to acquire a possessory right to it, such inclosure does not belong to the landlord, at least unless the tenant has acknowledged that he held such inclosed part of his landlord. *Doe v. Mulliner*, 1 Esp. 460.; and see *Attorney General v. Fullerton*, 2 Ves. & B. 263. And according to some later opinions expressed at *Nisi Prius*, wherever the tenant encloses some land adjoining the demised premises, and occupies it as parcel of them, such enclosure is presumed to be for the benefit of the landlord, and not adversely to him. *Doe v. Williams*, 7 C. & P. 332.; *Doe v. Murrell*, 8 C. & P. 134.

When the statute has once begun to run, no subsequent disability will stop its operation. Under the 21 Jac. 1. it was held that the saving clause only extended to the persons to whom the right first descended. *Doe v. Jones*, 4 T. R. 310. It was held in *Doe v. Jesson*, 6 East, 80., that the word *death*, in the saving clause of the statute, referred to the death of the person to whom the right first accrued, and who died under disability, and that the heir, though under disability, must enter within ten years from that time; but in a later case the court of C. P. were of opinion that the heir has ten years after his own disability ceases; *Cotterell v. Dutton*, 4 Taunt. 826.; and this is said to be the construction invariably adopted in practice; *Sugd. V. & P.* 334. The 16th and 17th sections of the 3 & 4 Wm. 4. c. 27. (*antè*, p. 448.) have put an end to these doubts. Where an estate descended to parceners, one of whom was under a disability which continued more than twenty years, and the other did not enter within twenty years, the disability of the one was held not to preserve the title of the other after the twenty years had elapsed. *Doe v. Rowleston*, 2 Taunt. 441.

Cases decided on 3 & 4 Wm. 4. c. 27.] It has been decided that the 2nd and 3rd sections of the late act (which came into operation 1st January, 1834) have done away with the doctrine of non-adverse possession, and, except in the cases falling within the 15th section, the question now is, whether twenty years have elapsed since the right accrued, whatever be the nature of the possession. *Nepean v. Doe*, 2 M. & W. 894.; *Culley v. Doe*, 11 A. & E. 1008. And the effect of the act is not merely to bar the remedy, but to bind and transfer the estate. *Incorporated Society*, 1 Connor & L. 84.

The word "rent" in sect. 2. means rent distinct from the land, as rent charges, &c., and not rent reserved on a demise; *Grant v. Ellis*, 9 M. & W. 113.; and the application of sect. 2., is not restrained by sect. 3. to the cases there enumerated; the object of the latter section being to explain the construction of the 2d in certain cases in which doubts might occur. *Per Tindal C. J.*, in *James v. Salter*, 3 New Ca. 544., 553.

A lessor may recover in ejectment within twenty years after the determination of the lease, though he has received no rent for twenty years and upwards before such expiration. *Doe v. Orenham*, 7 M. & W. 131.

Sect. 7. applies only to express trusts ; therefore where a vendee is let into possession without a conveyance or payment of rent, the vendor is barred after twenty years, unless the jury find that there was a tenancy at will created between them within that period. *Doe v. Rock*, 4 M. & G. 30. Where defendant entered as tenant at will in 1817, and the will was determined by the entry of the plaintiff against the defendant's consent in 1827, but defendant continued in possession till 1839 when the action was brought, held, that defendant became tenant at sufferance only in 1827, and that the action was too late, unless the jury find a new tenancy at will created after the entry in 1827, in which case the twenty years would run from the end of the first year of the new tenancy. *Doe v. Turner*, 7 M. & W. 226.; S. C. on error, 9 M. & W. 643.

By sect. 12. the possessions of tenants in common become separate from the commencement of the tenancy, and not merely from the passing of the act. *Culley v. Doe*, 11 A. & E. 1008.

D. mortgaged in fee to J., subject to a proviso of cesser on payment at a day more than twenty years before the statute. Within twenty years before the statute D. acknowledged that the money was unpaid. On ejectment by J.'s heir within five years after the passing of the act, the jury found the money was unpaid. Held, that the action was not barred by sec. 2.; D.'s possession not being adverse at the passing of the act (see sect. 15.), though the lessor of plaintiff was not shewn to have been in possession, or to have received rent or interest. *Doe v. Williams*, 5 A. & E. 291.; see also *Doe v. Thompson*, *ib.* 532. A feme sole, seised in fee, married, and she and her husband quitted possession of the land. Both died at times not shewn to be within forty years from the ceasing to occupy. The wife's heir brought ejectment within twenty years of her husband's death, and within five years of the passing of the statute, but more than forty years after she and her husband had left the land. Held, that the heir was barred by the 17th section, though it did not appear how the defendant came into possession, or that the wife levied any fine. *Doe v. Bramston*, 3 A. & E. 63.

In consequence of some doubts intimated in *Doe v. Williams*, *suprà*, it has been since declared by 7 Wm. 4. and 1 Vict. c. 28. that mortgagees may make an entry or bring actions to recover the land at any time within twenty years next after the last payment of any part of the principal or interest secured, though more than twenty years may have elapsed since the right of entry and action first accrued.

Competency of Witnesses.

The tenant in possession is not a competent witness to support his landlord's title. *Doe v. Williams*, *Coup.* 621. And where the lessor of the plaintiff proved a *prima facie* possession in the defendant, a third person was not allowed to prove that he was himself tenant in possession. *Doe v. Wilde*, 5 Taunt. 183.; *Doe v. Bingham*, 4 B. & A. 672.; *antè*, p. 108. And this incompetency, being founded on a supposed interest independent of the use made of the record, seems not

to be helped by the statute 3 & 4 Wm. 4. c. 42., *anté*, p. 111, 112. Where both parties claimed as lessees under the witness, and the question was, whether he demised first to the lessor of the plaintiff or to the defendant, he was held a competent witness where he had no interest in preferring one tenant to the other; but where the contending parties are to pay rent in different rights he is not, at common law, competent to prove either lease. *Bell v. Harwood*, 3 T. R. 310.; but see *Rees v. Walters*, 3 M. & W. 527.; and *Doe v. Clarke*, 3 New Ca. 429., cited *anté*, p. 112. An heir apparent has always been held a good witness in ejectment for the land; but not so a remainderman, for he has a present interest in the land. *Smith v. Blackham*, 1 Salk. 283.; *Doe v. Tyler*, 6 Bing. 390. *Anté*, p. 108. The mother of a defendant in ejectment, who claims to retain possession of premises as heir-at-law to his father, is a competent witness for the defendant, although the effect of her testimony is to prove a seisin in law in her husband, which would give her a claim to dower; for the result of the action will not affect her right. *Doe v. Maisey*, 1 B. & Ad. 439. An executor who takes a pecuniary legacy under a will is competent, at common law, to support it, as a will of land; for the verdict will only have the effect of establishing the will as to the real property. *Doe v. Teage*, 5 B. & C. 335. And the devisee of an undivided interest in the estate is competent for his co-devisee to prove the sanity of the testator; for he is not interested in the verdict. *Doe v. Pearce*, 5 M. & W. 506. Where a witness on the *voire dire* stated that the lessor of the plaintiff had formerly assigned to him the premises in question for a particular purpose, but that he had given up the deed to the lessor of the plaintiff and never had possession, he was held incompetent. *Doe v. Bragg*, R. & M. 87. And where the son of the plaintiff's lessor admitted that he employed the attorney for his father, who had promised by parol to let him have the land when recovered, he was rejected as incompetent by Parke, B., in *Doe v. Abbott*, Winton Sum. Ass. 1838. In ejectment by the lord of the manor, tenants having rights of common on the waste were held incompetent to prove the extent of it for the lord. *Doe v. Bramwell*, 3 Q. B. 307.

As to the competency of creditors, executors, &c. of a testator to support or impugn a will under the late act 7 W. 4. and 1 Vict. c. 26., see *anté*, p. 98, 99.

The above cases were decided before the stat. 6 & 7 Vict. c. 85., for improving the law of evidence; for which see the Appendix. By that act, however, a lessor of the plaintiff, or tenant of the premises in ejectment, is not rendered competent.

As to the recovery of mesne profits, see *post.*, *tit. Trespass for Mesne Profits*.

REPLEVIN.

The evidence in the action of replevin varies according to the nature of the issue joined.

In some cases the defendant is allowed by statute to plead not guilty, or, in a general form, that the matter complained of was done under the authority of an act of parliament, and to give the special matter in evidence under such general plea; as by 43 Eliz. c. 2., s. 19., in the case of poor rates, and by 23 Hen. 8., c. 5., s. 11. in the case of sewers' rates. 1 *Saund.* 347. c. (n.) These cases are expressly exempted from the operation of the new rules of pleading.

Evidence on non cepit, or cepit alio loco.] The plea of *non cepit*, that the defendant did not take the cattle, &c. is termed the general issue in replevin. It lies upon the plaintiff to prove this issue, and if found for the defendant it merely excuses him from damages, but does not entitle him to a return. It is sufficient for the plaintiff upon this issue to show that the defendant had the goods in his possession in the place in which, &c.; for the wrongful taking is continued in every place in which he afterwards detained them. *Walton v. Kersop*, 2 *Wils.* 354. The place in which goods are alleged in the declaration to have been taken is material. *Weston v. Carter*, 1 *Sid.* 10. If in fact the defendant neither took the cattle in the place named, nor had them there afterwards, the plaintiff must be nonsuited; but he is not entitled to a return, or to damages under 7 Hen. 8., c. 4., and 21 Hen. 8., c. 19., unless he pleads *cepit alio loco*, and adds an avowry by way of suggestion. 1 *Saund.* 347., note to *Potter v. North*. This avowry, so added, is not traversable.

Property in defendant or a stranger.] The defendant may set up the right of a third person, or of himself, to the property in the goods; for he has a right of possession against all but the right owner at the time of replevying. *Bro. Replevin*, pl. 31. *Butcher v. Porter*, 1 *Salk.* 94. The plea always traverses the property of the plaintiff; yet on issue thereupon, the defendant is to begin, because he also alleges the property to be in a third person named in the plea, or in himself. *Colstone v. Hiscobbs*, 1 *M. & Rob.* 301., cited *antè*, p. 177. And the plaintiff may prove property in part of the goods. *Com. Dig. Pleader*, 3 *K.* 12.

Avowry.] The defendant usually avows or makes cognizance in order to obtain a return of the goods; to which avowry or cognizance the plaintiff pleads in bar. The proofs under the most usual pleas in bar will be stated.

Avowry for Rent.] Where the distress is for rent, it is enacted, by 17 Car. 2., c. 7., s. 2., that in case the plaintiff shall be nonsuited after cognizance or avowry made and issue joined, or if a verdict shall be given against the plaintiff, then the jurors, impanelled or returned to inquire of such issue, shall at the prayer of the defendant inquire concerning the sum of the arrears, and the value of the goods or cattle distrained; and thereupon the avowant, or he that makes cognizance, shall have

judgment for such arrearages, or so much thereof as the goods or cattle distrained amount unto, &c. The avowant, therefore, must be prepared to prove both the amount of the rent in arrear and the value of the goods or cattle taken; and the omission of this inquiry cannot be supplied by a writ of inquiry; *Sheape v. Culpeper*, 1 *Lev.* 255., 1 *Saund.* 195. b. (n); though the defendant may have the common law judgment for a return. *Rees v. Morgan*, 3 *T. R.* 349. In all cases, except avowries for rent, the omission may be supplied by writ of inquiry. 1 *Saund.* 195. b. (n).

Fraudulent removal.] A distress on goods fraudulently removed must be specially pleaded, and cannot be shewn under the general form of avowry. 2 *Saund.* 284. (n). The rent must be due at the time of removal; *Rand v. Vaughan*, 1 *New Ca.* 767.; and if the plaintiff pleads in bar denying the fraudulent removal, the defendant must shew that there was no sufficient distress left on the premises. *Per Tindal, C. J.*, in *Parrey v. Duncan, M. & M.* 533. But the removal need not be shewn to be secret. *S. C. ib.* And even where the tenant admits he removed to avoid a distress, it is a question for the jury whether there was fraud. *John v. Jenkins*, 1 *C. & M.* 227.

Evidence on plea of non demisit, or non tenuit.] To an avowry for rent arrear the plaintiff usually pleads *non demisit* or *non tenuit*, upon which issue the defendant must prove the tenancy as stated in his avowry. He must prove a *demise* at a fixed rent; and therefore if he only shows an agreement for a lease, it is insufficient. *Dunk v. Hunter*, 5 *B. & A.* 322; *Hayward v. Haswell*, 6 *A. & E.* 265. But though the plaintiff enters upon the land under an agreement for a lease in which the amount of the rent is not stated, yet if he occupies and pays yearly rent, he becomes tenant from year to year at that rent, and an avowry, stating the terms of the tenancy accordingly, will be sufficient. *Knight v. Benett*, 3 *Bing.* 361. So if, entering under such an agreement, he acknowledges half a-year's rent to be due. *Cox v. Bent*, 5 *Bing.* 185; and see *Saunders v. Musgrave*, 6 *B. & C.* 524. But unless a person entering under an agreement for a lease pays the rent or promises to pay a rent certain, or to settle a rent certain in account, no demise at a rent certain can be implied, so as to entitle the landlord to distrain. *Regnart v. Porter*, 7 *Bing.* 451. So a tenant holding over after notice to quit given by the landlord, but not paying rent, is not liable to a distress; the mere holding over not making him tenant upon the old terms. *Jenner v. Clegg*, per Parke and Bolland, Bs., 1 *M. & Rob.* 213. The terms of the tenancy must be proved as laid; therefore if the rent reserved is higher than the rent stated, it is a variance; for the contract must be truly stated. *Brown v. Sayce*, 4 *Taunt.* 320. So where the defendant avowed for an entire rent of 170*l.*, and it appeared that he had only two-thirds of that rent as tenant in common of the reversion with another not named in the avowry, it was held a variance on *non tenuit*. *Philpott v. Dobbinson*, 6 *Bing.* 104. But where the defendant avowed for taking growing corn in four closes, and stated that the plaintiff held the closes in which, &c., at a yearly rent, and it appeared that he also held two other closes at that rent, this was decided to be no variance; for every part of the land was liable to the whole rent. *Hargrave v. Shewin*, 6 *B. & C.* 34.; and see *Page v. Chuck*,

10 *B. Moore*, 284. If the tenant avows for rent payable at Martinmas, this means *New Martinmas*; and if it appears that it is in fact payable at *Old Martinmas*, it is a variance. *Smith v. Walton*, 8 *Bing.* 235. Where the rent was reserved payable "quarterly, or half-quarterly if required," and the landlord received the rent quarterly for twelve months, it was held that he could not, without notice, distrain for a half quarter. *Mallam v. Arden*, 10 *Bing.* 299. The defendant cannot, on an avowry for double rent under the statute 11 Geo. 2., c. 19. s. 18., recover the single rent. *Johnstone v. Hudleston*, 4 *B. & C.* 938. A lease at a rent of 40*l.*, with a covenant to make an allowance out of it of 5*l.* payable to third persons, cannot be alleged as a lease at a rent of 35*l.* *Davies v. Stacey*, 12 *A. & E.* 506. Where there were pleas of *non tenuit* and tender, proof of a tender of a year's rent in November, without stating when it became due or the terms of the holding, is no proof of a holding from Michaelmas to Michaelmas as stated in the avowry. *Knight v. M'Douall*, 12 *A. & E.* 438.

Amendment on the very terms of the tenancy will be permitted at *Nisi Prius* on this issue. *Gayler v. Farrant*, 4 *New Ca.* 286. In replevin against the assignee of the reversion of part, the defendant may avow specially, and leave the jury to apportion, or may avow generally as for a certain rent, in which case the judge may amend either by directing the amount to be altered, or the avowry to be converted into a special one; and this amendment may be prayed for after verdict, and before it is recorded. *Roberts v. Snell*, 1 *M. & G.* 577.

As the plea of *nil habuit in tenementis* is a bad plea to an avowry for rent in arrear (*Sullivan v. Stradling*, 2 *Wils.* 208.), so the plaintiff is not allowed to give in evidence, under *non demisit* or *tenuit*, any matter amounting to *nil habuit in tenementis*, even though the title of the avowant be founded in fraud; *Parry v. House*, *Holt N. P. C.*, 489.; for a tenant shall not be allowed to dispute the title of his landlord, *ante*, p. 197, 417. And where the plaintiff in replevin came into the occupation of premises under a person who had submitted to a distress by the defendant, it was held, that he could not dispute the title of the defendant, though the latter had put in evidence a deed which showed that the plaintiff's predecessor occupied under a lease to which the defendant was a stranger. *Cooper v. Blandy*, 1 *New Ca.* 45. So where the plaintiff, being put into possession by A., was told by A. that the defendant was entitled, and thereupon paid defendant his rent, he cannot afterwards upon *non tenuit* set up the title of a third party who has taken no steps to eject the plaintiff. *Hall v. Butler*, 10 *A. & E.* 204. But where the plaintiff came in under another person and not under the defendant, and had paid rent to the defendant in ignorance of a defect in his title, the court of Common Pleas held that the plaintiff might show the want of title in the defendant. *Rogers v. Pitcher*, 6 *Taunt.* 202.; *Gregory v. Doidge*, 3 *Bing.* 474.; *Claridge v. Mackenzie*, 4 *M. & G.* 143. So a payment or acknowledgment made under the influence of a fraudulent or false representation will not estop the tenant. *Doe v. Brown*, 7 *A. & E.* 447. So under the plea of *non tenuit* the plaintiff may show that the defendant's title expired before the rent became due. *Gravenor v. Woodhouse*, 1 *Bing.* 38.; and see *Downs v. Cooper*, 2 *Q. B.* 256. Thus where a person, having an equitable title only, made a lease, and afterwards assigned all his interest at law and in equity, and then brought ejectment, the tenant was permitted to show the assignment as an answer to the action; *Doe v. Edwards*, 5 *B. & Ad.* 1065;

and he may show his landlord's title expired though he has paid rent to him after such expiration, provided the rent was paid in ignorance of the landlord's title. *Fenner v. Duplock*, 2 Bing. 10. Land belonging to a parish was occupied by A., who paid rent to the churchwardens. The latter executed a lease of the land for a term of years to B., and gave A. notice of the lease. It was held that A. was not estopped by having paid rent to the churchwardens from disputing B.'s title, and that the latter could not derive a valid title from the churchwardens, who were not a corporation so as to hold or convey land. *Phillips v. Pearce*, 5 B. & C. 433.

It is no variance, under *non tenuit*, if it appear that the plaintiff held for a less time than that stated in the avowry. *Forty v. Imber*, 6 East, 434.

Under *non tenuit*, the plaintiff may shew an eviction by a third person and a subsequent attornment to the evictor. *Hopcraft v. Keys*, 9 Bing. 613. But if the landlord has evicted his tenant, and no fresh tenancy has commenced, the eviction should be pleaded. *Semb. ib.* 617. The plaintiff may dispute the avowant's derivative title from the landlord under *non tenuit*. *Rogers v. Pitcher*, 6 Taunt. 202.

An avowry under 8 Anne, c. 14., for a distress six months after the end of the tenancy, must be special.

Evidence on plea of riens in arrear.] The plea in bar of *riens in arrear*, proof of which lies on the plaintiff, admits the demise stated in the avowry. Therefore where, to an avowry for rent due upon a *quarterly* holding, the plaintiff pleads *riens in arrear*, he cannot shew that the holding is *half-yearly* and that no rent had accrued. *Hill v. Wright*, 2 Esp. 669. It will not be sufficient to support this plea to shew that part of the rent has been satisfied; for the defendant will be entitled to a verdict if it appear that part of the rent is in arrear. *Cobb v. Bryan*, 3 B. & P. 348. The plaintiff may, as it seems, under this plea (although a special plea as usual) shew that he has paid the rent to a superior landlord under a threat of distress; for such payment is in law a payment to the immediate landlord so as to leave no rent in arrear. *Taylor v. Zamira*, 6 Taunt. 524.; *Stubbs v. Parsons*, 3 B. & A. 519. The payment is not less compulsory because the ground landlord has allowed the occupier time to pay. *Carter v. Carter*, 5 Bing. 406. So where a demand in respect of interest on a mortgage affecting the premises is paid with the avowant's assent, the plaintiff may avail himself of the payment under this plea. *Dyer v. Bowley*, 2 Bing. 94.; and see *Pope v. Biggs*, 9 B. & C. 245. But it is doubtful whether a collateral payment by the tenant, though stipulated for in the lease, can be shewn on this plea. *Davies v. Staacy*, 12 A. & E. 506. See further *antè*, p. 405. Where the plaintiff pleaded *non tenuit*, and *riens in arrear*, and the first issue was found for him, the second issue was held immaterial, and the proper course was to discharge the jury from finding any verdict upon it; *Cossey v. Diggon*, 2 B. & A. 546.; but as the costs of each issue are now divisible, a verdict must now be found on each, except by consent.

Evidence on traverse of being bailiff.] If the plaintiff traverses that the defendant is bailiff as stated in the cognizance, the defendant must prove his authority to make the distress; and a recognition of his act

will be equivalent to a previous command. *Trevillian v. Pine*, 11 Mod. 112., 1 Saund. 347. d. (π). And the ratification may be after action. *Per curiam* in *Whitehead v. Taylor*, 10 A. & E. 213. One joint-tenant, or coparcener, or co-heir in gavel-kind has an authority in law, without proof of any express command, to distrain as bailiff of his co-tenant; *Leigh v. Shepherd*, 2 B. & B. 466.; but it is not clear that he can do so in spite of the express dissent of his co-tenants. *S. C.*, and *Robinson v. Hofman*, 4 Bing. 565., and one tenant in common cannot receive the share of rent due to his co-tenant after notice to the plaintiff not to pay it to him. *Harrison v. Barnby*, 5 T. R. 246. A corporation may appoint a bailiff to distrain without deed. *Smith v. Birmingham Gas Co.*, 1 A. & E. 526. Where defendant makes cognizance as bailiff of an executor for rent due to the testator, it is enough to prove a distress by the testator's direction, made after his death and before probate, but subsequently adopted by the executor. *Whitehead v. Taylor*, 10 A. & E. 210.

Evidence on avowry for damage feasant.] Where the defendant avows taking cattle damage feasant, he may plead that the *locus in quo* is his soil and freehold, which the plaintiff may deny, and the evidence in such case will be the same as under the plea of *liberum tenementum* in trespass *quare clausum fregit*. See *post*, tit. *Trespass*. So the plaintiff may plead in bar the defect of fences which the defendant was bound to repair, whereby the cattle escaped; a right of common, way, &c.; *Com. Dig. Pleader*, (3 K. 23.); in which cases the evidence will of course depend upon the issue joined.

Evidence on a plea of tender.] To an avowry for rent the plaintiff may plead a tender of the rent; to an avowry for damage feasant a tender of amends. A plea to an avowry for rent of a tender of 16*l.* is not supported by proof of a tender of 15*l.* 16*s.*, though no more rent be due than the sum proved to have been tendered. *John v. Jenkins*, 1 C. & M. 227. A tender before distress makes the taking unlawful; after distress, and before impounding, the detention unlawful. *Sir Carpenters' case*, 8 Rep. 146. b.; *Ladd v. Thomass*, 12 A. & E. 117. Although it has been held that a tender of amends to a mere bailiff is not good; *Pilkington's case*, 5 Rep. 76.; 1 *Brownl.* 173.; yet if the bailiff is the avowant's usual receiver, or if it appear from other circumstances that he is his agent for that purpose, such tender is good. *Gilb. Repl.* 89.; *Browne v. Powell*, 4 Bing. 230. A tender to one deputed by the bailiff is bad. *Pimm v. Grevill*, 6 Esp. 95. Tender either to the landlord or to his bailiff who makes the distress is sufficient. *Smith v. Goodwin*, 4 B. & Ad. 413.

Damages.] The damages recovered by the plaintiff are usually confined to the expence of the replevin bond, unless some special damage be alleged and proved.

Competency of Witnesses.

It has been held that the declarations of a person, under whom the defendant makes cognizance, are not evidence for the plaintiff, because he may be called as a witness for the plaintiff; *Hart v. Horn*, 2 Camp.

92. ; but such declarations should seem upon principle to be evidence ; for if such person should be produced as a witness for the defendant making cognizance, he would be incompetent ; *Golding v. Nias*, 5 *Esp.* 273. ; and it should seem that he is not compellable to give evidence against his interest. *Anté*, p. 40. 118. The act 3 & 4 W. 4. c. 42. s. 26. does not apply to cases where the witness is *quasi* a party, as the person whose bailiff makes cognizance. *Semb. argu. King v. Baker*, 2 *A. & E.* 338., *anté*, p. 112, 118. In replevin by an under-tenant against the superior landlord who distrains as bailiff of the mesne tenant, the latter is not a competent witness to prove the amount of rent due from the under-tenant. *Upton v. Curtis*, 1 *Bing.* 210. ; *S. C.* 8 *B. Moore*, 52. Upon this case Lord Denman C. J., delivering the opinion of the court in *King v. Baker*, 2 *A. & E.* 340., observed, " There is reason to suppose the facts are not reported with perfect accuracy. The court only held that an intermediate tenant under whom cognizance had been made (the distress being taken by the landlord), was not admissible to prove the amount of the sub-tenant's rent. This may have been because he had an interest in reducing his own rent by raising that of his tenant." See also *Spargo v. Brown*, 4 *M. & R.* 640. Where the defendant made cognizance, 1st, under a demise by A. to B., and, 2dly, under a demise from B. to the plaintiff, and there was a plea of *non tenuit*, and at the trial the defendant abandoned his second cognizance, it was held that he might call B. as a witness ; abandoning the issue being equivalent to consenting that a verdict should be found against him. *King v. Baker*, *suprà*.

The sureties in the replevin bond are, at common law, incompetent witnesses for the plaintiff. *Bailey v. Bailey*, 1 *Bing.* 92.

The defendant avowed that the plaintiff and one J. B. held the *locus in quo* as tenants to the defendant, &c., upon which issue was joined. It was not proved that J. B. was so connected with the plaintiff as to be jointly liable for the rent, nor was it shewn that the goods distrained were the joint property of the plaintiff and J. B. ; but there was evidence of a joint occupation, and of a joint lease which J. B. had refused to execute. Held that J. B. was competent for the plaintiff, unless his joint interest appeared on the *voire dire*. *Bunter v. Warre*, 1 *B. & C.* 689. So in *Tremlett v. Sharland*, Exeter Spring As. 1837, on an issue on the joint tenure of plaintiff and his father, Gurney B. admitted the father to disprove it.

The late act for the improvement of the law of evidence, 6 & 7 Vict. c. 85., does not render competent the landlord or other person in whose right the defendant makes cognizance.

TRESPASS FOR ADULTERY.

In an action of trespass for criminal conversation, the plaintiff must prove, (1.) His marriage, and (2.) The fact of adultery. It is usual also to give evidence of circumstances in aggravation.

Evidence of marriage.] In this action the plaintiff is held to strict proof of his marriage, and proof of cohabitation and reputation is insufficient. *Morris v. Miller*, 4 Burr. 2057.; *Birt v. Barlow*, 1 Doug. 170. Even words of the defendant which imply an admission of the fact have been held insufficient; as where, being surprised at a lodging with the wife of the plaintiff Morris, and being asked "where Morris's wife was," the defendant replied, "In the next room;" for it was only a confession that she went by the name of Morris's wife. *Morris v. Miller*, 4 Burr. 2057. This decision, however, does not warrant the conclusion that a distinct acknowledgment of the marriage made by the defendant will not be evidence against him, and sufficient to dispense with the more formal proof of it; 2 Phill. Ev. 201.; and see *Freeman's case*, 1 East, P. C. 470. In *Rigg v. Curgenoe*, 2 Wils. 399., where the case of *Morris v. Miller* was cited, it was said by the court, that, if it were proved that the defendant had seriously or solemnly recognised that he knew the woman to be the plaintiff's wife, it would be evidence for the jury without proving the marriage: and there seems indeed to be no good reason why the admission of the defendant should not, as in other civil actions, be evidence against him of the fact admitted. The marriage is usually proved by the production of an examined copy of the register, and it is not necessary to call attesting witnesses of the marriage; but some proof of the identity of the parties must be adduced. See *antè*, p. 84., and *Hemmings v. Smith*, 4 Doug. 33. So it may be proved by calling a person who was present at the marriage, without proving the registration, or license, or banns, *antè*, p. 84.; but evidence of non-publication of banns may be given by the defendant. See *post*, "Defence."

If the marriage took place under stat. 26 Geo. 2. c. 33. s. 1. in a chapel, the plaintiff must prove that it was a chapel in which banns had been usually published at the time of the passing of the marriage act. *R. v. Northfield*, 2 Doug. 658. And where a register of marriages going back to the year 1578, and a register of the publication of banns from the year 1754, (when the marriage act passed,) were produced from the chapel royal in the Tower, Lord Ellenborough held it sufficient evidence upon which to found a presumption that banns had usually been published before the marriage act in that chapel. *Taunton v. Wyborn*, 2 Camp. 297. Marriages in chapels erected and consecrated since the 26 Geo. 2. have been rendered valid by various retrospective statutes. See 21 Geo. 3. c. 53.; 44 Geo. 3. c. 77.; 48 Geo. 3. c. 127.; and 6 Geo. 4. c. 92.; and by these statutes the registers, or copies of the registers, of such marriages, are to be received in evidence. By 6 Geo. 4. c. 92. s. 2. it shall be lawful for marriages to be in future solemnised in all churches and chapels erected since

the passing of 26 Geo. 2. and consecrated, in which churches and chapels it has been customary and usual, before the passing of that act, (6 Geo. 4.) to solemnise marriages; and the registers of such marriages, or copies thereof, are declared to be evidence. By stat. 4 Geo. 4. c. 76. s. 2., after 1 Nov. 1823, "All banns of matrimony shall be published in an audible manner in the parish church, or in some public chapel in which chapel banns of matrimony may now or may hereafter be lawfully published, of or belonging to such parish or chapelry wherein the persons to be married shall dwell; and by sect. 3. the bishop of the diocese, with the consent of the patron and the incumbent of the church of the parish in which any public chapel, having a chapelry thereunto annexed, may be situated, or of any chapel situated in an extra-parochial place, signified to him under their hands and seals respectively, may authorise, by writing under his hand and seal, the publication of banns and the solemnisation of marriages in such chapels for persons residing in such chapelry or extra-parochial place; and such consent, together with such written authority, shall be registered in the registry of the diocese." See also 6 & 7 W. 4. c. 85. s. 26.

The marriage acts, 26 Geo. 2. c. 33. and 4 Geo. 4. c. 76., do not extend to the marriages of *Jews* and *Quakers*, such marriages being expressly excepted; and they may therefore be proved in the same manner as marriages before the passing of those acts. But by 6 & 7 W. 4. c. 85. s. 2. & 4. such marriage is good only if both parties are *Jews* or *Quakers* respectively, and notice shall be given to the registrar of the intended marriage, and a certificate be issued by the registrar agreeably to the provisions of that act. See also 3 & 4 Vict. c. 72. s. 5. In order to prove a Jewish marriage two witnesses were called, who swore that they were present at the marriage in the synagogue; but upon an objection made, that what took place at the synagogue was merely a ratification of a previous written contract, and that, as that contract was essential to the validity of the marriage, it ought to be produced and proved, the contract was put in. *Horn v. Noel*, 1 Camp. 61. As to the form of this contract, see *Lindo v. Belisario*, 1 Hag. Con. 225. 247., App. p. 9., and *Goldsmid v. Bromer*, 1 Hag. Con. 324. If the plaintiff is a Quaker, the marriage must be proved to have taken place according to the ceremonies of that sect. 1 Hag. Con. Appendix, p. 9. (n.); *Deane v. Thomas, M. & M.* 361. As to the marriages of other dissenters, there was no exception in the marriage acts until the act of 6 & 7 W. 4. c. 85. referred to hereafter.

The marriage acts do not extend to marriages abroad, and a marriage celebrated abroad according to the law of the foreign state is recognised in this country as a valid marriage. Therefore a marriage in Scotland between English subjects according to the Scotch law is good in our courts. *Dalrymple v. Dalrymple*, 2 Hag. Con. 54.; *Harford v. Morris*, *Id.* 430. So a marriage in Ireland by a dissenting minister in a private room, has been held good. *R. v. —*, Old Bailey, 1 Russ. C. L. 205. 2nd ed.; *Smith v. Maxwell, R. & M.* 80. But see the opinion of the judges in *R. v. Millis, Dom. Proc.*, Feb. 1843. In proving a foreign marriage some evidence must be given of the law of the foreign state; and it is the practice of the ecclesiastical courts to receive such evidence from professors of the law in question. *Lindo v. Belisario*, 1 Hag. Con. 248.; *Middleton v. Janverin*, 2 Hag. Con. 441.; but see *Harford v. Morris*, 2 Hag. Con. 431. In the case of *Dalrymple*

v. Dalrymple, 2 *Hag. Con.* 81., the authorities upon which the court proceeded were of three classes : 1. The opinions of learned professors given in that or similar cases ; 2. The opinions of eminent writers, as delivered in books of legal credit and weight ; and, 3. The certified adjudication of the tribunals of Scotland. Where evidence of the law of Scotland with regard to the legality of a marriage was required, the testimony of a witness, who was a tobacconist, was rejected. *Anon.* cited 10 *East*, 287. See further as to proof of foreign laws, *antè*, p. 82.

A marriage between British subjects in a British settlement is valid, if it be such a marriage as would have been valid in this country before the passing of the marriage act, 26 Geo. 2. Thus a marriage between two British subjects, solemnised by a Catholic priest at Madras, and followed by cohabitation, but without the license of the governor, which it had been the uniform custom to obtain, is valid. *Latour v. Teesdale*, 8 *Taunt.* 830. ; *S. C.* 2 *Marsh*, 243. So in the case of *R. v. Brampton*, 10 *East*, 282., Lord Ellenborough was of opinion that, where the parties had accompanied the King's forces to St. Domingo, they might be considered to have carried with them the law of England, and that therefore the marriage, being according to the English law independent of the marriage act, was valid.

The marriage of English subjects in the chapel of the English ambassador abroad appears to have been valid ; see *R. v. Brampton*, 10 *East*, 286. ; and now by statute 4 Geo. 4. c. 91. s. 2., reciting that it is expedient to relieve the minds of his Majesty's subjects from any doubt concerning the validity of a marriage solemnised by a minister of the church of England in the chapel or house of any British ambassador, or minister, residing within the country to the court of which he is accredited, or in the chapel belonging to any British factory abroad, as well as from any possibility of doubt concerning the validity of marriages solemnised within the British lines by any chaplain or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad, it is *declared* and enacted that all such marriages shall be deemed and held to be as valid in law, as if the same had been solemnised within his majesty's dominions with a due observance of all forms required by law. See also 9 Geo. 4. c. 91. ; *Waldegrave Peerage*, 4 *Cl. & Fin.* 649.

A marriage between English subjects in a foreign country, not celebrated according to the laws of that country, nor in an ambassador's chapel, &c., is invalid. *Middleton v. Janverin*, 2 *Hag. Con.* 437. ; *Scrimshire v. Scrimshire*, *id.* 395. ; *Lacon v. Higgins*, 3 *Stark.* 183. ; *Kent v. Burgess*, 11 *Sim.* 361.

The latest marriage act is that of 6 & 7 W. 4. c. 85., of which the object was to provide means of legal marriage for dissenters and others who object to the rites of the church of England. It does not generally affect marriages according to those rites, except that it makes a registrar's certificate equivalent to banns ; sect. 1.

After 1st of March 1837, superintendent registrars may grant licences to be married in a building registered under the act, or in his office ; sect. 11.

Sects. 18, 19, and 34., provide for the registration of chapels, &c., and the formation, every year, of lists of the registered chapels.

By sect. 42. if any persons shall knowingly and wilfully intermarry in any place other than the church, chapel, registered building, office,

or other place specified in the notice and certificate required by that act, or without due notice to the superintendant registrar, or without certificate of notice duly issued, or without licence when licence is necessary under the act, or in the absence of a registrar or superintendant registrar when their presence is necessary, the marriage shall be null and void. Provided that nothing therein shall annul a marriage solemnised under the Marriage Act, 4 Geo. 4.

Proof of the adultery.] "In suits in the Ecclesiastical Courts, it has been laid down that it is not necessary to prove the direct fact of adultery. In every case, almost, the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion. What are the circumstances that lead to such a conclusion cannot be laid down universally, because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances apparently slight and delicate in themselves, but which may have most important bearings in the particular case.—The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion." *Per* Sir W. Scott, in *Loveden v. Loveden*, 2 Hag. Con. 2. Habitual cohabitation, even where the nights have been passed separately, has been held evidence of adultery, though there was no proof of other familiarities. *Cadogan v. Cadogan*, 2 Hag. Con. 4. (n.); and see *Chambers v. Chambers*, 1 Hag. Con. 444.; *Williams v. Williams*, id. 299.; *Elwes v. Elwes*, id. 277. In a case before the delegates, where the chief evidence relied on was that the wife had been seen going into a house of ill-fame with a man, the adultery was held to be proved; and Mr. Justice Buller observed that there were many cases in the King's Bench where the adultery was established on presumptive evidence. *Wood v. Wood*, 4 Hag. Eccl. Rep. 138. (n.); and in *Trevanion v. Dabuz*, Bodmin Sum. As. 1834, Patteson J. refused to nonsuit, and the plaintiff had a verdict, though the evidence was of a general nature, and pointed to no precise act or time.

Where the statute of limitations is pleaded, the plaintiff may give evidence of acts of adultery which took place more than six years since with a view to shew the nature of the connection subsisting between the parties within the six years. *Duke of Norfolk's case*, 12 How. St. Ty. 927.

The confession of the wife is not evidence for her husband; but conversations between her and the defendant are evidence against the latter; *B. N. P.* 28.; *Baker v. Morley*, 1 Selw. N. P. 24.; so perhaps letters written by her to defendant, coupled with his conduct on receipt of them, such as the continuance of a suspicious intercourse with her. *Per* Sir W. Scott, in *Loveden v. Loveden*, 2 Hag. Con. 52.

Evidence in aggravation.] Conversations between the husband and wife are evidence to shew their mutual affection. *Trelawney v. Coleman*, 1 B. & A. 91. So letters from the wife to the husband, or to a third person, written before suspicion of criminal intercourse, *ib.*; although the letters may contain facts which in themselves are not admissible evidence; *Willis v. Bernard*, 8 Bing. 376. The judgment formed by a witness from the anxiety which the wife had expressed

concerning her husband, and from her mode of speaking of him during his absence, is admissible evidence of affection. *Trelawney v. Colman*, 2 Stark. 192. The wife's declarations as to her intentions in leaving her husband may be given in evidence, as part of the *res gestæ*, to remove a suspicion of connivance on his part. *Hoare v. Allen*, 3 Esp. 276. Proof of a settlement and provision for children is admissible evidence in aggravation. *B. N. P.* 27. As to evidence of the wife's character, see *antè*, p. 55.

Evidence of the amount of the defendant's property is not admissible with a view to damages. *Per Alderson B.*, in *James v. Biddington*, 6 C. & P. 589., and see also *antè*, p. 54.

Defence.

Evidence to disprove the marriage.] If the marriage of the plaintiff be irregular and void, the defendant may give evidence to prove that fact. Thus he may shew that there was no due publication of banns or licence; for by 4 Geo. 4. c. 76. s. 22., if any person shall knowingly and wilfully intermarry without due publication of banns or licence, such marriage shall be null and void. Under this clause it seems sufficient that the banns are published in the known and acknowledged, though not the real, names of the parties. Thus where a man, whose name was A. L., had resided for three years in the parish in which he was married under the name of G. S., and was married by banns by such name, the marriage was held valid. *R. v. Billingshurst*, 3 M. & S. 250. So where the name had been assumed for sixteen weeks on account of the party having deserted from the army. *R. v. Burton-upon-Trent*, *Id.* 537. So where a married woman upon the death of her husband assumed her maiden name, and after the lapse of several years was married by banns to a second husband in that name with the description of widow, it was held, in the absence of fraud, that such marriage was legal. *R. v. St. Faith's Newton*, 3 D. & R. 348. But where the banns have been published in the wrong names of the parties, and there is no evidence to shew that they have ever been known by such names, the marriage is void. *Mather v. Ney*, cited 3 M. & S. 265.; see also *Stanhope v. Baldwin*, 1 Addams, 93.; *Green v. Dalton*, *Id.* 289. So where a wrong name is fraudulently assumed for the purposes of the marriage. *Frankland v. Nicholson*, cited 3 M. & S. 259.; see also *Fellowes v. Stewart*, 2 Phill. 257.; and other cases, *Ib.* 321. 365. But a licence in a wrong name, not fraudulently assumed, will not avoid a marriage under the old Marriage Act. *Lane v. Godwin*, Q. B., H. T. 1843.

The rules on the subject of banns are thus laid down by Lord Tenterden in *R. v. Tibshelf*, 1 B. & Ad. 195.: "First, if there be a total variation of name or names, that is, if the banns are published in a name or names totally different from those which the parties, or one of them, ever used, or by which they were ever known, the marriage, in pursuance of that publication, is invalid, and it is immaterial in such cases whether the misdescription has arisen from accident or design, or whether such design be fraudulent or not. But, secondly, if there be a partial variation of name only, as the alteration of a letter or letters, or the addition or suppression of one Christian name, or the names have been such as the parties have used, and been known by, at one time and not another,

in such cases the publication may or may not be void; the supposed misdescription may be explained, and it becomes a most important part of the inquiry, whether it was consistent with honesty of purpose, or arose from a fraudulent intention. It is in this class of cases only, that it is material to inquire into the motives of parties."

The above cases were decided upon the old Marriage Act, 26 Geo. 2. The act now in force, 4 Geo. 4. c. 76., is differently expressed, and annuls the marriage only where *both* parties knew of the undue publication; therefore, where the intended husband procured the banns to be published in a Christian and surname which the woman had never borne, but she did not know that fact until after the solemnisation of the marriage, such marriage was held good. *R. v. Wroston*, 4 B. & Ad. 640. The corresponding clause in the 6 & 7 W. 4. c. 85. has been already stated, *supra*, p. 462.

By 4 Geo. 4. c. 76. s. 26., it shall not be necessary, in support of a marriage, to give any evidence of the residence of the parties as directed in that act, nor shall any evidence be received to prove the contrary.

It has not been decided whether the plea of Not guilty admits the marriage. As there is a decision (*see post*, p. 469.) that this plea does not put in issue the service in an action for seduction, it should seem that, on principle, it also admits the marriage.

Evidence that the parties lived separate.] Whether proof, that at the time of the adultery the husband and wife were living separate by consent, be a defence in this action, does not appear to be clearly settled. In *Weedon v. Timbrel*, 1 Esp. 16.; *S. C.* 5 T. R. 357., where the husband, having some suspicion of his wife's misconduct, had taken a lodging for her, for which and for her board he paid, and that at the time when the adultery was committed they were living in a state of separation, Lord Kenyon ruled that the action could not be maintained, and the court refused to set aside the nonsuit. So in *Bartelot v. Hawker, Peake*, 7., where the husband and wife had been separated by articles, Lord Kenyon said that if the parties were separated by mutual consent at the time, he was of opinion that the husband could not maintain this action; for it was impossible to receive any injury by losing the society of a wife whom he had already abandoned; but on proof of an act of adultery *before* the separation, the jury found a verdict for the plaintiff. In a subsequent case, however, where the defence was that the parties were living under articles of separation at the time, Lord Kenyon said it was a question that he had entertained considerable doubts upon, but he was inclined to suffer the cause to proceed, and take a note of the objection, that it might be brought before the court. *Hodges v. Windham, Peake*, 39. And in a still more recent case, where the husband and wife had separated under articles, and the wife was living apart from her husband, though not in pursuance of the terms of the articles, Lord Ellenborough observed that he did not consider the question, whether the mere fact of separation between the husband and wife by deed was such an absolute renunciation of his marital rights as prevented the husband from maintaining an action for the seduction of his wife, as concluded by the decision in *Weedon v. Timbrel*; *Chambers v. Caulfield*, 6 East, 248.; in which case it was held that, as the wife was not living apart from her husband with the consent of the trustees in the deed, she

was not living apart from him with his consent, and that therefore the plaintiff's right to recover was not affected by the deed. And in *Graham v. Wigley*, 2 *Roper's Husb. and Wife*, p. 323. (2d ed.), Abbott C. J. held that a voluntary separation without deed, so that there might still be a suit for restitution of conjugal rights, was no bar.

Where the separation is not with a view of renouncing the marital character, as where the husband and wife are living as servants in different families, the action may be maintained. *Edwards v. Crook*, 4 *Esp.* 39.

Evidence of the plaintiff's misconduct in bar.] If a woman be suffered to live as a prostitute with the privity of her husband, and a man is thereby drawn into adultery with her, Lord Mansfield laid it down as clear law, that the action will not lie. *Smith v. Allison*, *B. N. P.* 27.; *Hodges v. Windham*, *Peake*, 39. But, unless with the husband's privity, it will not go to the action, but only to the damages. *B. N. P.* 27. If the plaintiff was consenting to the adultery of his wife, he cannot recover. *Howard v. Burtonwood*, 1 *Selw. N. P.* 10.; *Duberley v. Gunning*, 4 *T. R.* 656.; *Hoare v. Allen*, *Selw. N. P.* 11 (n), 3 *Esp.* 276. The open infidelity of the husband was considered by Lord Kenyon to be a bar to the action. *Sturt v. Marquis of Blandford*, cited 4 *Esp.* 17.; *Wyndham v. Lord Wycombe*, *ib.* 16. But in a subsequent case, Lord Alvanley was of opinion that the infidelity or misconduct of the husband could never be set up as a legal defence to the adultery of the wife, but went in mitigation of damages only. *Bromley v. Wallace*, 4 *Esp.* 237. And in *Trevanion v. Daubuz*, Bodmin Sum. As. 1834, Patteson J. directed the jury that the neglect or misconduct of the husband was only matter of mitigation: But if they thought his conduct was occasioned by a desire to get rid of his wife; if he had thereby encouraged the advances of the defendant and testified a desire to "throw her away," they would properly find for the defendant. And *per Alderson J.*, the plaintiff is entitled to recover unless he has been in some degree a party to his own dishonour, or has totally and permanently given up all advantage from his wife's society. *Winter v. Henn*, 4 *C. & P.* 498.

Evidence in mitigation of damages.] Proof of the husband's bad conduct, as that he lived in criminal connection with other women, is, we have seen, proper evidence in mitigation of damages. *B. N. P.* 27.; *Bromley v. Wallace*, 4 *Esp.* 237. So that he had turned his wife out of the house, and refused to maintain her. *B. N. P.* 27. And where the plaintiff called a witness to prove the harmony of himself and wife before the adultery, Lord Lyndhurst allowed him to be cross-examined as to declarations of the wife before the criminal intercourse, complaining of ill treatment by the husband. *Winter v. Wroot*, 1 *M. & Rob.* 404. For the same purpose the defendant may give evidence of the wanton manners of the wife, and that the first advances were made by her to him. *Gardener v. Jadis*, 1 *Selw. N. P.* 25. Or that the wife committed adultery with others, or had a bastard before marriage. *Roberts v. Malston*, *B. N. P.* 296. Though evidence of loose conduct or criminality with others, before the commission of the fact complained of, is admissible in mitigation of damages, yet acts of subsequent misconduct are not. *Per Lord Kenyon C. J.*, *Elam v. Faucett*, 2 *Esp.* 562. In general the letters of the wife to the defendant are not evi-

dence for him; *Baker v. Morley*, B. N. P. 28.; yet where they had been written before the time when the criminal facts were proved to have been committed, Lord Kenyon admitted them with a view to shew that the defendant had been solicited by the wife. *Elam v. Faucci*, *suprà*.

TRESPASS FOR SEDUCTION.

In an action for seduction, the plaintiff must prove, (1.) That the party seduced was, in fact or in contemplation of law, his servant; and (2.) The seduction.

Evidence of the service.] Although this action cannot be maintained without some proof of the service, or liability to service, and it is not sufficient merely to shew that the plaintiff has incurred an expence in consequence of her confinement (*Satterthwaite v. Duerst*, 5 East, 47 (n), S. C., 4 Doug 315.; *Postlethwaite v. Parkes*, 3 Burr. 1878; *Hall v. Hollander*, 4 B. & C. 668.) yet it is not necessary to prove an actual contract of service, or that wages have been paid. The slightest evidence of service, such as milking cows, has been held sufficient. *Bennett v. Allcott*, 2 T. R. 168. Even making tea has been said to be an act of service. *Per* Abbott C. J., *Carr v. Clarke*, 2 Chitty's Rep., 261.; *Mann v. Barrett*, 6 Esp. 32. The relation of master and servant must subsist, yet a very slight relation is sufficient; therefore, when a daughter has been seduced, the parent may maintain an action on the supposed relation, though the rank and circumstances of the parties make it improbable that such a child should be treated as a menial servant. *Fores v. Wilson, Peake*, 55. A right to the service is sufficient; and where a daughter is living with her father, forming part of his family and liable to his control and command, no proof of service is required. *Per* Littledale J., *Maunder v. Venn*, M. & M. 324.; *R. v. Chillesford*, 4 B. & C. 102. And if the child is a minor, and of an age capable of service, the service may be presumed. *Harris v. Butler*, 2 M. & W. 542. The action is maintainable, though the daughter was of age. *Booth v. Charlton*, cited 5 East, 47.; *Tullidge v. Wade*, 3 Wils. 18. And where the daughter was a married woman, separated from her husband and living as a servant with her father, it was held that the latter might maintain this action. *Harper v. Luffkin*, 7 B. & C. 387. The action was held to lie, though the daughter had not been actually confined before action brought, and though the plaintiff had voluntarily turned her out of his house upon discovery of her pregnancy; *per* Lord Denman C. J., *Joseph v. Cavander*, Winton Sum. As. 1834.

It must appear that the daughter was residing with the plaintiff at the time of her seduction. Thus, where she was residing in another person's family in the capacity of housekeeper, though not under any contract for wages, and though she might have left when she pleased, it was held that the father could not maintain the action; for the daughter had no *animus revertendi*. *Dean v. Peel*, 5 East, 45.; *Curr v. Clarke*, 2 Chitty's Rep. 260. So no action lies, though the daughter intended to return at the end of her service. *Blaymire v. Haley*, 6 M. & W. 55. But

if she was merely absent on a visit at the time when she was seduced, the action lies. *Johnson v. M'Adam*, cited 5 *East*, 47. ; accord. *Harris v. Butler*, 2 *M. & W.* 542. Where the defendant procured the daughter and servant of the plaintiff to leave him under pretence of hiring her as his servant, and seduced her, Abbott C. J. held the action maintainable. *Speight v. Oliviera*, 2 *Stark.* 493. Where the plaintiff put a daughter out to board and reside with defendant as an apprentice for two years, no action was held to lie against the defendant for seducing her whereby she became ill and was obliged to remove to the plaintiff's house again and to be supplied by the plaintiff with medicines, &c. *Harris v. Butler*, 2 *M. & W.* 539.

Where the action was brought by the aunt of the party seduced, with whom she resided, it was held that she stood *in loco parentis*, and was entitled to recover, though the mother was living. *Edmondson v. Machell*, 2 *T. R.* 4. ; 11 *East*, 24. So where the plaintiff, an officer in the army, had adopted the daughter of a deceased soldier, he was held entitled to maintain this action. *Irwin v. Dearman*, 11 *East*, 23. So a master, not related to the party seduced, may recover damages against the defendant for debauching her. *Fores v. Wilson, Peake*, 55. ; see *Hall v. Hollander*, 4 *B. & C.* 663. But the action cannot be supported by the assignees of a bankrupt master. *Howard v. Crouther*, 8 *M. & W.* 601.

Damages—Evidence in aggravation.] Though the loss of service is the legal foundation of this action, and though it is difficult to reconcile to principle the giving of greater damages on another ground, the practice is become inveterate, and cannot now be shaken. *Per* Lord Ellenborough C. J., in *Irwin v. Dearman*, 11 *East*, 24. Damages therefore may be given for the loss which the plaintiff has sustained by being deprived of the society and comfort of his child, and by the dishonour which he suffers. *Southernwood v. Ramsden*, *Schw. N. P.* 1042. The jury may take into consideration all that the plaintiff can feel from the nature of the loss. They may look upon him as a parent losing the comfort as well as the service of his daughter, in whose virtue he can feel no consolation, and as the parent of other children whose morals may be corrupted by her example. *Per* Lord Eldon, *Bedford v. M'Kowl*, 3 *Esp.* 120. ; see also *Chambers v. Irwin*, 2 *Schw. N. P.* 1042. ; *Tullidge v. Wade*, 3 *Wils.* 19.

The plaintiff may prove that the defendant was addressing his daughter as an honourable suitor. *Dodd v. Norris*, 3 *Camp.* 519. ; *Elliott v. Nicklin*, 5 *Price*, 641. It has been held that neither in chief nor on cross-examination can the plaintiff shew that the defendant had previously made a promise of marriage to the daughter. *Dodd v. Norris*, *suprà* ; *Tullidge v. Wade*, 3 *Wils.* 19. But several cases are mentioned by Mr. Starkie (*vol. 2, p. 722.*) where such evidence has been admitted, not with a view to augment the damages, but to vindicate the character of the person seduced, and to shew the means used by the defendant to effect the injury ; and in *Capron v. Balmoud*, Exeter Sp. As. 1831, Parke J. not only allowed proof of a promise, but also that defendant had persuaded the daughter to take measures to destroy her offspring, and had spoken to her about hiring a nurse and other arrangements in contemplation of marriage ; these facts being all immediately connected with the act complained of.

The plaintiff is allowed to prove the amount of the expences sustained by him in consequence of his daughter's confinement, &c. *Tulledge v. Wade*, 3 Wils. 19. The amount of a surgeon's bill, though not paid, may be recovered; but not a physician's fees, if not actually paid; since the payment of them cannot be enforced. *Dixon v. Bell*, 1 Stark. 289.

Declarations of the defendant's wife, tending to prove a confederacy between them to seduce the plaintiff's daughter, have been admitted, *Knowles v. Compigne*, cited *antè*, p. 44.

Evidence of character.] The plaintiff cannot give evidence of the daughter's good character, unless in answer to evidence of *general* bad character on the other side; *Barnfield v. Massey*, 1 Camp. 460.; and even where the daughter had been cross-examined as to circumstances of extreme indelicacy and levity in her conduct, Lord Ellenborough ruled that the plaintiff was not at liberty to call witnesses to character; for there was an opportunity of explaining, on re-examination, the questions put on the cross-examination. *Ibid.* But in another case, where the cross-examination of the party seduced went to shew that she had conducted herself immodestly towards the defendant before the seduction, and that she kept improper company, the plaintiff was allowed, without objection, to prove the general good character and modest deportment of his daughter, and the general respectability of the family. *Bate v. Hill*, 1 C. & P. 100. See *antè*, p. 54, 55.

Defence.

The new rules have, to a certain extent, altered the effect of the general issue in actions for trespass for personal injuries.

The plea of Not guilty does not put the plaintiff to proof of the service, but admits it. *Torrence v. Gibbins*, Q. B. M. T. 1843.

Where the plaintiff had been guilty of gross misconduct in suffering the defendant to continue his visits as a suitor to his daughter, after he knew that he was a married man, on an alleged probability of divorce, and after he had received a caution against admitting him into his family, Lord Kenyon nonsuited the plaintiff. *Reddie v. Scoolt, Peake*, 240. But it may be doubted whether this is not rather matter in reduction of damages.

In mitigation of damages the defendant may shew the loose character of the daughter; but if the daughter be asked whether, before her acquaintance with the defendant, she had not been criminally connected with other men, she is not bound to answer the question. *Dodd v. Norris*, 3 Camp. 519. He may prove expressions of the daughter tending to shew the levity of her character; but if the expressions also tend to contradict her evidence, they cannot be proved without previously asking her, on cross-examination, whether she used them. *Carpenter v. Wall*, 11 A. & E. 803.

TRESPASS FOR ASSAULT AND BATTERY.

In an action of trespass for assault and battery, the evidence for the plaintiff varies according to the nature of the defendant's plea.

Evidence under the general issue.] Under Not guilty, the plaintiff must prove an assault or battery. An attempt to do a corporal injury to another coupled with a present ability, as holding up a weapon at a man within reach, is an assault. *Gerner v. Sparkes*, 1 *Salk.* 79. So riding after a person, and obliging him to run away to avoid being beaten, is an assault. *Martin v. Shoppee*, 3 *C. & P.* 373. To upset a carriage or chair in which a person is sitting is a trespass against the person. *Hopper v. Reeve*, 7 *Taunt.* 698, 700. Where parish officers cut off the hair of a pauper, against his will, it was held an assault. *Forde v. Skinner*, 4 *C. & P.* 239. A battery, which always includes an assault, is the actual doing a corporal injury, be it ever so small, in an angry or revengeful or rude or insolent manner; as by spitting in a man's face, or violently jostling him out of the way. *B. N. P.* 15. To throw water on a person is a battery. *Pursell v. Horne*, 8 *A. & E.* 602. But to collar any one, merely in order to prevent him and another from fighting, has been held not an assault or battery. *Griffin v. Parsons*, 1 *Selw. N. P.* 27 (n). But see *post*, p. 472. In order to constitute a battery, it is not essential that the act should appear to be wilful; if it happens by negligence or mistake an action will lie. *Weaver v. Ward*, *Hob.* 134. Therefore where a soldier in exercise wounded one of his comrades by accident, he was held liable in trespass. *Ibid.*; *Underwood v. Hewson*, 1 *Stra.* 596. But where the injury is unavoidable, and the conduct of the defendant is entirely without fault, no action will lie. *Wakeman v. Robinson*, 1 *Bing.* 213; *B. N. P.* 15. And this may be shewn on the general issue. See *post*, "Defence."

Plaintiff, how far confined as to the time and number of assaults, &c.] Where it is stated in the declaration that the defendant on divers days and times between two certain days assaulted the plaintiff, the plaintiff may give in evidence any number of assaults within those days; or he may prove a single trespass at any time before action brought; *B. N. P.* 86.; 1 *Saund.* 24. (n.); *antè*, p. 66.; and even after proving several assaults within the period mentioned in the declaration, he would perhaps be allowed to give evidence of assaults committed before that time as proof of the defendant's malice. 2 *Phill. Ev.* 194. If trespasses incapable of continuance are improperly so laid, the defendant may confine the plaintiff at the trial to a single act. *B. N. P.* 86.

Where the declaration contains only one count, the plaintiff cannot, after giving evidence of one assault, waive it, and give evidence of another. *Stante v. Pricket*, 1 *Camp.* 473. And when the action is brought against several for a joint trespass committed at a particular time, he must confine himself to that period; and if all the defendants were not then concerned in the trespass committed at that time, the

plaintiff cannot have recourse to a trespass committed at any other time when some only of the defendants were concerned who were not implicated in the first transaction; for some of the defendants might thereby be subjected to damages for a trespass in which they had no concern. *Sedley v. Sutherland*, 3 *Exp.* 202. So where the plaintiff proved a joint trespass against all the defendants, it was held that he could not waive that trespass and prove another against some of the defendants only, though there were two counts in the declaration. *Tait v. Harris*, 1 *M. & Rob.* 282. But the principle of this decision has been doubted by Patteson J., in *Hitchen v. Teale*, 2 *M. & Rob.* 30.; and a plaintiff, who has proved a trespass by three of four defendants, may waive it and prove another implicating all four. *Roper v. Harper*, 5 *Scott*, 250.

Evidence under son assault demesne.—De injuriâ.] One of the most common pleas in this action is *son assault demesne*, i. e. that the plaintiff made the first assault, and that the defendant's battery was in self-defence. *Co. Lit.* 212. b. If to this plea the plaintiff replies *de injuriâ suâ propriâ absque tali causâ*, he puts the whole matter of the plea in issue, and the defendant will have to prove a prior assault by the plaintiff. *Timothy v. Simpson*, 1 *C. M. & R.* 757. If he proves that the plaintiff lifted up his stick and offered to strike him, it is a sufficient assault to justify his striking the plaintiff, and he need not stay till the plaintiff has actually struck him. *B. N. P.* 18. But it is not every assault that will justify every battery, and it is matter of evidence whether the assault was proportionable to the battery; thus if A. strike B., B. cannot justify drawing his sword and cutting off A.'s hand. *Cook v. Beal*, 1 *Ld. Raym.* 177. It seems, however, that in such case the plaintiff will not be allowed to take advantage of the excess in the violence of the defendant's assault under the general replication *de injuriâ*, but should reply the excess. *R. v. Tebbart, Skinner*, 287.; see *Franks v. Morris*, 10 *East*, 81. (n). Thus where the plaintiff declared that the defendant beat, bruised and wounded him, and the defendant pleaded *son assault demesne*, to which the plaintiff replied *de injuriâ*, &c. and it appeared in evidence that the plaintiff, meeting the defendant, shook his stick at him, whereupon the defendant committed a violent assault upon the plaintiff and beat him; on a verdict for the defendant, the court held that if the defendant had assaulted the plaintiff more violently than was necessary for self-defence, the plaintiff ought to have replied that fact specially. *Dale v. Wood*, 7 *B. Moore*, 33.; *Oakes v. Wood*, 3 *M. & W.* 150. But it is not always necessary to new assign. Thus, where the plaintiff alleges and proves an assault and battery, and the plea alleges matter to justify both, the defendant must prove enough of his plea to justify both. *Per curiam, Lamb v. Burnett*, 1 *C. & J.* 294. So where the declaration alleged an assault, a turning out of plaintiff's house, and imprisonment, and the plea justified the assault and removal by a *molliter manus*, and that, because the plaintiff assaulted him, the defendant gave him in charge to a constable, it was held that, if the plaintiff proved the imprisonment, the defendant must prove the assault by the plaintiff. *Reece v. Taylor*, 4 *Nev. & M.* 469. So where plaintiff complained of imprisonment and blows by defendant, and defendant pleaded a justification of the imprisonment under process, and because the plaintiff conducted himself with

violence when in custody, therefore defendant struck him; it was held that defendant was bound, on the replication de injuriâ, to prove the plaintiff's violence in order to justify the blows, and that plaintiff was not obliged to new assign. *Philips v. Horgate*, 5 B. & A. 220. Where the declaration was for assaulting and beating with a stick, and the pleas were, 1, Not guilty; 2, As to assaulting with the stick, son assault demesne; it was held that defendant was entitled to a verdict generally on proof of his plea, and that plaintiff could not have damages merely because the plea did not expressly justify the beating; for this was only ground of special demurrer to the plea. *Blunt v. Bearmont*, 2 C. M. & R. 412.

Where the plaintiff can justify his first assault, he must reply such matter of justification specially; for it cannot be given in evidence under the replication de injuria, &c. *King v. Phippard, Carth.* 281.; B. N. P. 18. But where the defendant and another person were fighting, and the plaintiff came and took hold of the defendant by the collar in order to separate the combatants, whereupon the defendant beat the plaintiff; on son assault demesne pleaded, and replication de injuriâ generally, it was objected that the plaintiff ought to have replied the matter specially, but Legge B. overruled the objection, observing that the evidence was not offered by way of justification, but for the purpose of shewing that there was not any assault; for it was the *quo animo* that constituted an assault, which was matter to be left to a jury. *Griffin v. Parsons*, 1 Selw. N. P. 27 (π). The reason assigned for this decision appears to be incorrect; for the collaring was an assault, whatever the animus might be, otherwise a special plea of *moliter manus impositus* to separate combatants (2 Bro. Ent. 143, &c.) would be bad. Perhaps a better reason may be, that the defendant's battery under such circumstances was not a mere act of self-defence, but a resistance to the lawful interference of the plaintiff.

Where there is only one count in the declaration, and the defendant pleads son assault demesne, and proves an assault by the plaintiff on the day mentioned in the declaration or any other day before action brought, the plaintiff will not be entitled to give evidence of an assault committed by the defendant on another day. *Downes v. Skrymsher*, 1 Brownl. 233.; B. N. P. 17.; Roll. Ab. Trial (c). If in fact there are two assaults, one only of which the defendant can justify, and he pleads son assault demesne, the plaintiff should new assign; but if there are two counts in the declaration, the new assignment will be unnecessary; for as the defendant can only prove one justification, the plaintiff, on proving two assaults, must have a verdict. B. N. P. 17. Yet where there are two counts, if the defendant pleads Not guilty and a justification, and in his justification alleges that the trespasses in both counts are one and the same, and the plaintiff replies de injuriâ &c., he will be confined to the proof of one trespass only; *Gale v. Dalrymple*, R. & M. 118.; *Gibson v. Hawkey*, Id. 121 (π); for by allowing the defendant to identify the trespasses, he has deprived himself of the advantage of his two counts. So in some cases if there are two counts in the declaration, the plaintiff may, by new assigning, preclude himself from giving evidence of two acts of trespass. Thus where the declaration contained two counts for assault and false imprisonment, and the defendant pleaded Not guilty to both counts, and a justification under meane process to the first count; and the plaintiff, as to the justification,

new assigned (whereby he admitted that the arrest under the mesne process was justified), and then gave in evidence another act of imprisonment under the new assignment, upon which he failed; it was held, that he could not give evidence of either act of trespass under the second count, for that there was but one imprisonment besides that which he had waived, and *that* one being the subject of the new assignment, the plaintiff could not avail himself of it on the second count. But if the plaintiff could have proved that there were in fact two imprisonments besides that which he waived, he might have made use of the second count. *Atkinson v. Matteson*, 2 T. R. 172.

Evidence on plea of justification in defence of possession.] If the defendant pleads that he was possessed of a house, &c., and that the plaintiff without his licence entered and disturbed the defendant, whereupon he requested the plaintiff to depart, and on refusal gently laid hands upon him to turn him out of the house; and the plaintiff replies *de injuriâ*, &c.; the defendant must shew his possession, the plaintiff's entry and disturbance, the request to depart, and his refusal. If in fact the defendant was guilty of an excess of violence in resisting the plaintiff, the latter should new assign (or reply) such excess. *Weaver v. Bush*, 8 T. R. 78. If the plaintiff enters forcibly into the defendant's house, the latter may resist force by force without any previous request to depart, but the justification in such case should not be pleaded by way of *molliter manus imposuit*; the defendant should plead that the plaintiff with a strong hand endeavoured forcibly to break and enter the defendant's close, whereupon the defendant resisted and opposed such entrance, &c., and that if any damage happened to the plaintiff it was in the defence of the possession of the close. *Com. Dig. Pleader*, 3 M. 16, 17. So where plaintiff alleged an assault and dragging through a pond; and defendant pleaded 1. Not guilty, and 2. that plaintiff was unlawfully in the defendant's close, &c.; held that the latter plea did not cover the dragging through the pond, and that plaintiff was entitled to a verdict for so much under the general issue, and need not new assign. *Bush v. Parker*, 1 New Ca. 72. Where the declaration stated an assault and battery, ill-treating and wounding with a truncheon, &c. and the defendant pleaded; 1. Not guilty; 2. As to assault and battery and ill-treating, a removal out of defendant's house because the plaintiff was making a disturbance there; replication *de injuriâ*; held that plaintiff was entitled to a verdict and damages for the wounding without a new assignment, but that he could not shew on *de injuriâ* that the defendant removed him for other and different reasons and motives than those assigned in the special plea. *Oakes v. Wood*, 2 M. & W. 791.; see also 3 M. & W. 150. And, generally, where a defendant pleads and proves a good cause of justification, it is no answer on *de injuriâ* that he in fact alleged and acted upon another and a bad one at the time of the trespass. *Semb. per cur. in Bailie v. Kell*, 4 New Ca. 650, 651.

A plea justifying the removal of plaintiff from a boat in his possession is not supported by proof that defendant had contracted with the boat-owner for the exclusive use of it on a certain occasion, on which it was to be navigated by the servants of the owner. *Dean v. Hogg*, 10 Bing. 345. Upon the replication *de injuriâ* to a plea justifying in defence of

his dwelling-house, it is not enough for the defendant to shew possession of a room as a lodger. *Monks v. Dykes*, 4 M. & W. 567.

Evidence on plea of reasonable chastisement.] Where the plaintiff complained of assaulting and beating with fists and a rope, putting him in irons, &c., the defendant justified, as master of a ship, flogging and imprisoning the plaintiff for mutiny and disobedience, and the plaintiff replied *de injuriâ*; it was held that he could not go into evidence of disproportionate punishment. *Lamb v. Burnett*, 1 C. & J. 294, 295, 298. So where the defendant justifies the moderate correction of his apprentice, the replication *de injuriâ* only puts in issue the misconduct of the plaintiff, and not the moderation of the punishment. *Penn v. Ward*, 2 C. M. & R. 338.

Evidence on plea justifying under process or authority of law.] If the process be irregular only, and not void nor set aside for irregularity, it is a good defence, and the plaintiff cannot defeat the plea by proof of the irregularity. *Riddell v. Pakeman*, 2 C. M. & R. 30. Declaration stated an assault and imprisonment. The plea alleged an arrest on charge of felony, and because the plaintiff resisted, the defendant beat him; held, that it was unnecessary to prove the resistance, because the rest of the plea was a sufficient justification of the alleged trespass. *Atkinson v. Warne*, 1 C. M. & R. 627. Where the defendant justifies under a *ca. sa.*, and the plaintiff, admitting the writ, replies *de injuriâ absque residuo*, &c., he may shew that the defendant did not in fact act under the writ at all; but cannot shew the arrest to be a trespass *ab initio* in consequence of antecedent matter without a special replication. *Price v. Peck*, 1 New Ca. 380. See post, p. 481.

Certificate under 9 Geo. 4. c. 31. s. 27.] A certificate of a summary conviction or dismissal by two justices on a complaint in respect of the same assault or battery must be specially pleaded. Where the plea stated the giving of a certificate "forthwith" (in the words of the act), and the replication denied that defendant had obtained such certificate *modo et formâ*, it was held that the replication put in issue the obtaining *forthwith*, and that a certificate granted some months after dismissal did not support the plea; held also that the dismissal of the complaint as "not proved" was not in itself an answer independently of the certificate. *R. v. Robinson*, 12 A. & E. 672.

Evidence under alia enormia.] Nothing can be given in evidence under *alia enormia* except acts which could not be put upon the record. Per Lord Kenyon C. J., *Lowden v. Goodrick, Peake*, 46. Therefore in an action for trespass and false imprisonment it was ruled that the plaintiff could not shew that he had been stinted in his food, *ibid.*; or that he caught the gaol fever. *Pettit v. Addington*, *Id.* 62. But he may prove intemperate language of the defendant. *Merest v. Harvey*, 5 Taunt. 442.

Damages.] Evidence may be given of the circumstances which accompany and give a character to the trespass, in order to enhance the damages. *Bracegirdle v. Orford*, 2 M. & S. 79. The circumstances of time and place, when and where the insult was given, require different

damages; thus it is a greater insult to be beaten upon the Royal Exchange than in a private room. *Per Bathurst J., Tullidge v. Wade*, 3 Wils. 19. See *post*, "Defence."

Defence.

The new rules of pleading contain no express provision to alter the effect of pleas in trespass for personal injuries.

The case of justices, constables, and others who are permitted to shew special justifications under the general issue will be found, *post*, p. 478. and in the last part of this work.

Inevitable accident, arising from superior agency, is a defence under the general issue; but where the trespass is the act of the defendant, though it may be excused by involuntary accident owing to the act of the plaintiff, it must be specially pleaded. Thus where the defence was that the plaintiff slipped off the pavement and got under the defendant's carriage and was driven over by the defendant, this was held to be no defence on Not guilty in trespass, though it may perhaps be so in an action on the case alleging negligence. *Hall v. Fearnley*, Q. B., M. T. 1842.

Although the defendant cannot, under the general issue, give in evidence matter of defence amounting to a justification, yet he may give any circumstance in mitigation which tends to reduce the quantum of damages, and which could not have been pleaded. 3 Stark. Ev. 1460; *Vin. Ab. Ev. (I. b.) pl. 16.*; 2 B. & P. 225 (n). Thus in trespass for false imprisonment against a private person, evidence of reasonable suspicion of the plaintiff's having been guilty of the felony is admissible on the general issue in reduction of damages. *Chinn v. Morris*, R. & M. 424. So in trespass for false imprisonment against the captain of a ship, Buller J. admitted, under the plea of Not guilty, evidence of expressions used by the plaintiff at the time tending to create mutiny and disobedience; for every thing which passed at the time is part of the transaction on which the plaintiff's action is founded, and he therefore cannot be surprised by the evidence. *Bingham v. Garnault*, 1 Esp. Dig. N.P. 337.; S.C. B. N.P. 17. But in trespass for assault and battery, plea, Not guilty, evidence was offered that the beating was given by way of punishment for misbehaviour on board the ship of which defendant was captain, and it was insisted that the conduct of the defendant at the time of the assault, being necessarily in evidence, proved the misbehaviour; but Lord Eldon C. J. held that, as no justification was pleaded, the jury should give damages to the amount of the injury suffered, without lessening them on account of the circumstances under which it was inflicted; and the Court of Common Pleas confirmed this direction. *Watson v. Christie*, 2 B. & P. 224. And in trespass for false imprisonment on a charge of false pretences defendant cannot cross-examine the plaintiff's witnesses as to the character of the plaintiff, or previous charges against him. *Downing v. Butcher*, 2 M. & Rob. 374.

TRESPASS FOR FALSE IMPRISONMENT.

In an action of trespass for false imprisonment, the plaintiff, on the general issue, must prove the fact of imprisonment and the special damage, if any. Most of the cases under the last head of trespass for assault and battery are applicable to this action.

As it is sometimes a question under the general issue whether the facts proved are the proper subject of an action of trespass or case, some of the leading authorities on this point are subjoined.

Form of action with regard to magistrates, &c.] "The general rule of law as to actions of trespass against persons having a limited authority (as commissioners of bankrupt) is plain and clear. If they do any act *beyond* the limit of their authority, they thereby subject themselves to an action of trespass; but if the act done be *within* the limit of their authority, although it may be done through an erroneous or mistaken judgment, they are not thereby liable to such an action." *Per* Abbott C. J., *Dorwell v. Impey*, 1 B. & C. 169.; *Lowther v. Earl of Radnor*, 8 East, 113.; *Mills v. Collett*, 6 Bing. 85. Exercising legal authority in a harsh or oppressive manner is not the subject of an action of trespass. *Per cur.*, *Willes v. Bridger*, 2 B. & A. 286. Where a magistrate acts without those circumstances which must concur to give him jurisdiction, as where he grants a warrant without information upon a supposed charge of felony, he is liable in trespass. *Morgan v. Hughes*, 2 T. R. 225. But if there be an information, it matters not whether it is, or purports to be, founded on inadmissible evidence. *Cave v. Mountain*, 1 M. & G. 257. So where a magistrate commits a person for re-examination for an unreasonable time, he is answerable in trespass; the continuance of a person in custody after a reasonable time being a new trespass; *Davis v. Capper*, 10 B. & C. 28.; and whether reasonable or not is a question for the jury. *Cave v. Mountain*, 1 M. & G. 257. Where an officer detains a person under process after bail tendered, or other ground of discharge, he is liable in case and not in trespass. *Smith v. Egginton*, 7 A. & E. 167. 175.

An action of trespass cannot be maintained against a judicial officer, as against the steward of a court baron, where his bailiff by mistake takes the goods of A under a precept against B. *Holroyd v. Breare*, 2 B. & A. 473. Nor will trespass lie against the sheriff for the irregular act of his bailiff under a judgment obtained in the county court. *Tinsley v. Nassau*, M. & M. 52. But if the steward of a court baron or hundred court, instead of leaving process to be executed by the usual officer, directs it to persons named by the party, from whom he takes an indemnity, he is then liable in trespass for their acts. *Bradley v. Carr*, 3 M. & G. 221.

Where the clerk of a court of requests irregularly issues a precept of execution without the authority of the court, yet the serjeant who executes it is not liable, but only the clerk. *Andrews v. Marris*, 1 Q. B. 3. A summoned B before the commissioners of a court of requests who, upon default of B, heard the case *ex parte* and directed a precept to be issued under which he was taken in execution. B, being in fact

not resident within their jurisdiction, brought trespass against A, the commissioners, and the serjeant. Held that the action could not be supported against A; that it lay against the commissioners, unless they could shew that evidence had been given from which they were justified in assuming that B was resident within their jurisdiction; and that it lay against the serjeant in a case where the precept was bad on the face of it; otherwise not. *Carratt v. Morley*, 1 Q. B. 18. See further as to the liability of magistrates and officers, *antè*, p. 143, 144., and *post*, “*Actions against Constables and Justices*.”

Form of action with regard to private persons.] If a party acts himself in apprehending another, he is liable in trespass; but if he falsely and maliciously, and without any probable cause, puts the law in motion, it is properly the subject of an action on the case; *per* Bayley J. *Elsee v. Smith*, 1 D. & R. 103.; *Barber v. Rollinson*, 1 C. & M. 330.; unless he is a party to the actual arrest, of which his presence and interference are evidence; *West v. Smallwood*, 3 M. & W. 418. Trespass for imprisonment by plaintiff; plea Not guilty: the plaintiff proved that, being a prisoner, he had been brought up to the Court of King's Bench by an order obtained by defendant, and served by him on the goaler, and thereupon committed on an attachment for non-payment of costs; held, that this was *primâ facie* a trespass by defendant, and not the mere act of the court. *Bryant v. Clutton*, 1 M. & W. 408.; *dissent*. Lord Abinger C. B., who thought that the action, if any lay, should be case. In *Sowell v. Champion*, 6 A. & E. 407. 417., it was held that the attorney who places a writ of execution in the hands of an officer is not guilty of trespass, though he may be persuaded that the officer will execute it in a place which turns out on inquiry to be out of his jurisdiction; but if he *directs* it to be executed there, or if the officer tells the attorney of his intention, and the attorney, knowing it to be illegal, acquiesces in it, it may make him a trespasser. See 1 *Saund.* 74. a. (n). If the warrant be illegal under which the party acted, he is liable in trespass; and in such an action, if the plaintiff's counsel opens the case as an arrest upon an illegal warrant, the plaintiff is not bound to produce the warrant, but the defendant, if he relies upon it as a justification, must produce it. *Holroyd v. Doncaster*, 3 Bing. 492. Where the defendant represented that the plaintiff was a fit person to be impressed, and in consequence he was impressed though not a fit person, it was held that the defendant was liable in trespass; and *per* Lord Ellenborough C. J., “This is not like a malicious prosecution, where the party gets a valid warrant or writ, and gives it to an officer to be executed. There was clearly a trespass here in seizing the plaintiff, and the defendant therefore was a trespasser in procuring it to be done; nor is proof of malice necessary.” *Flewster v. Royle*, 1 Camp. 187. Where a sheriff's officer arrests a person under two writs, and detains him after he has a right to a discharge under one, yet trespass does not lie, if in fact his imprisonment was justified under the other. *Blessley v. Sloman*, 3 M. & W. 40.

Proof of the imprisonment.] The circumstances which will amount in law to an arrest or imprisonment are stated in another place. See *antè*, p. 388. *Case for Malicious Arrest*; and *post*, *Actions against Constables, &c.*

Defence.

In actions against justices, constables, churchwardens, &c., the defendants may give any special justification in evidence under the general issue; see 21 Jac. 1. c. 12. s. 2. post, *Actions against Justices, and against Constables*. A private individual is not within the above statute, unless acting in aid of the constable. *Bond v. Rust*, 2 C. & P. 342. And he must therefore plead his justification specially, and prove it as stated.

TRESPASS TO PERSONAL PROPERTY.

The evidence for the plaintiff in an action of trespass for taking away or injuring personal property varies according to the nature of the issue joined between the parties.

Form of action—trespass, or case.] In cases of accidents occurring in driving carriages, steering ships, &c., questions frequently arise as to the proper form of action. The following distinctions may be drawn from the decisions on the subject. See 2 H. Bl. 442. (n), 4th ed.

(1.) Where the injury is both *wilful* and *immediate*; as where a person wilfully rows a boat against nets and destroys them, *Tripe v. Potter*, cor. Yates J., cited 8 T. R. 191., trespass is the only form of remedy. *Ogle v. Barnes*, 8 T. R. 192.; *Moreton v. Hardern*, 4 B. & C. 227.; *Williams v. Holland*, 10 Bing. 112.

(2.) Where the injury is *immediate* but not *wilful*, and occurred only by the negligence of the party; as where a man firing a gun without sufficient caution accidentally hurts another; *Weaver v. Ward*, Hob. 134.; *Underwood v. Hewson*, 1 Stra. 596.; or where a person drives on the wrong side of the way in the dark and accidentally injures another carriage; *Leame v. Bray*, 3 East, 593.; *Lotan v. Cross*, 2 Camp. 465.; *Hopper v. Reeve*, 1 B. Moore, 407.; or where a person, steering a ship, through ignorance or unskilfulness runs it against another; *Covell v. Laming*, 1 Camp. 497.; trespass may be maintained; but in such cases trespass is not the only form of remedy; for the party injured may, it seems, waive the trespass and sue in case for the negligence. *Hall v. Pickard*, 3 Camp. 187. Thus, where the plaintiff declared that the defendants so incautiously, carelessly, negligently, and inexpertly managed and steered their ship, that by reason of their negligence, &c., it ran foul of the ship of the plaintiff, after verdict for the plaintiff the Court of King's Bench refused to arrest the judgment. *Ogle v. Barnes*, 8 T. R. 188.; *Turner v. Hawkins*, 1 B. & P. 472. So where the declaration stated that the defendant took such bad care of his cart and horse in driving, that, through his negligence and want of care, &c., the cart struck the horse of the plaintiff and was hurt, &c.; on demurrer, the court intimated a clear opinion, that, as the injury was expressly alleged in the declaration to have arisen from mere negligence and want of care, the demurrer could not be sustained. *Rogers v. Imbleton*, 2 New Rep. 117. So in an action on the case against several

persons as owners of a coach for carelessly and negligently driving their coach by their servant, &c., it appeared that at the time of the accident one of the defendants was himself driving, and it was insisted that the action ought therefore to have been trespass, and not case; but the court held the action to be rightly brought, for that the plaintiff had a right to sue all the defendants, and trespass could not have been maintained against them all. *Moreton v. Hardern*, 4 B. & C. 223. See also *Branscomb v. Bridges*, 1 B. & C. 145.; *Smith v. Goodwin*, 4 B. & Ad. 413.; *Williams v. Holland*, 10 Bing. 112. So where a person builds on a party wall and thereby darkens the plaintiff's windows, case lies; though trespass would also lie for building on the plaintiff's half. *Wells v. Ody*, 1 M. & W. 452. So where defendant diverts a water-course by a weir built partly on the plaintiff's land; *per cur. ibid.* And it seems that case lies for injuring the plaintiff's reversion in a house by mining under a contiguous house in the plaintiff's possession. *Raine v. Alderson*, 4 New Ca. 702. But it is not to be taken as a general principle that case lies for every consequential injury arising out of a substantive trespass. *Per cur. Hensworth v. Fowkes*, 4 B. & Ad. 458, 460.

(3.) Where the injury is not immediate but consequential, trespass will not lie, and case is the proper remedy. "In all the books the invariable principle to be collected is, that where the injury is immediate on the act done, there trespass lies; but where it is not immediate on the act done but consequential, then the remedy is in case." *Per Le Blanc J., Leame v. Bray*, 3 East, 593.; *Covell v. Laming*, 1 Camp. 498.; *Day v. Edwards*, 5 T. R. 649.

(4.) Where the act arises by the negligence of the defendant's servant, trespass cannot be maintained, and case is the only remedy. *Morley v. Gaisford*, 2 H. Bl. 442.; *Huggett v. Montgomery*, 2 New Rep. 446. But if the master and servant are sitting together, and the servant is driving the master, the act of the servant is the act of the master, and the trespass of the servant is the trespass of the master; *Chandler v. Broughton*, 1 C. & M. 29.; for the master can control the servant; and the case differs from that of a pilot and shipmaster; for the pilot is independent. *Per cur. ibid.*; accord. *Wheatley v. Patrick*, 2 M. & W. 652.

5. Where the property injured is not in the immediate possession of the owner but has been let to hire, the owner must bring case, and cannot maintain trespass; for it is in the nature of an injury to his reversion. *Hall v. Pickard*, 3 Camp. 187. But the mere gratuitous bailing of the property to another does not take it out of the possession of the owner, so as to prevent him from maintaining trespass. *Lotan v. Cross*, 2 Camp. 464.

What possession of the plaintiff is sufficient.] Any possession is sufficient property as against a third person who has no title at all. *Com. Dig. Tresp. (B. 4.)*; *Nelson v. Cherrill*, 8 Bing. 316. And therefore a mere wrongdoer cannot set up the title of the real owner under a plea denying the plaintiff's property. *Carter v. Johnson*, 2 M. & Rob. 263. The master of a ship or boat may bring trespass for an injury to it, though not his property. *Moore v. Robinson*, 2 B. & Ad. 817. And property is sufficient without possession; for the right of property draws to it the possession. Therefore where goods are taken after the owner's death and before probate granted to his executor, the latter, after pro-

bate granted, may maintain trespass. *Com. Dig. Tresp. (B. 4.)*; *Smith v. Mica*, 1 *T. R.* 460; *Dunwich v. Sterry*, 1 *B. & Ad.* 631. So the lord of a manor may maintain trespass for an estray or wreck before seizure. *Ibid.* So the vendee of goods may bring it, though he never had possession. *Thomas v. Phillips*, 7 *C. & P.* 573. So a person who has leased his land for years without any reservation of the timber may have trespass *de bonis asportatis* during the continuance of the term against a third person who wrongfully cuts down the timber, and carries it away. *Ward v. Andrews*, 2 *Chitty's Rep.*, 636. But the lessee cannot maintain such an action. *Evans v. Evans*, 2 *Camp.* 401. Nor can the landlord of a furnished house, let to a tenant, bring trespass against the sheriff for taking the furniture in execution. *Ward v. Macrauley*, 4 *T. R.* 469. If the owner of a chattel gratuitously permits another to use it, he may maintain trespass for an injury done to it by a third person while so used. *Loten v. Cross*, 2 *Camp.* 464. But Lord Abinger was of opinion that where the plaintiff left a certificate of his character with the defendant, he could not maintain trespass for an injury to it while in the defendant's custody. *Taylor v. Rowan*, 1 *M. & Rob.* 491. Trespass does not lie for taking animals *feræ nature*, unless reclaimed or privileged *ratione loci*. *Bac. Ab. Tresp. (E.)*

Evidence to connect defendant with the trespass.] Though a party is not liable for the act of a stranger, as the postilion of a hired carriage, yet where the defendant sat on the box, and was heard to give directions, this was held evidence of a joint trespass in a case of collision. *McLaughlin v. Pryor*, 4 *M. & G.* 48. Trespass against A. and B. for taking plaintiff's gun. Plaintiff proved that A. took, and afterwards delivered it to B., who refused to give it up to plaintiff; held that this did not make B. a joint trespasser by relation, unless it was taken for B.'s use or benefit. *Wilson v. Barker*, 4 *B. & Ad.* 614. For cases of relation, see *post*, *Actions against Sheriffs*. A pound-keeper is not liable for receiving goods distrained, unless he exceeds his duty or assents to the trespass. *Badkin v. Powell*, *Cowp.* 478. See further, *Tresp. quare clausum fregit*, *post*, p. 487.

Defence.

Evidence under the general issue.] Under the general issue the defendant might formerly shew that the goods in question were not the property of the plaintiff. *Martin v. Podger*, 2 *W. Bl.* 701. But this is altered by the rules of H. T. 4 W. 4., which provide that the plea of Not guilty shall operate as a denial of the defendant having committed the trespass alleged by taking or damaging the goods mentioned, but not of the plaintiff's property therein. Since these rules, the plea admits the property of the plaintiff, which must therefore be traversed, if disputed.

In trespass for taking goods, chattels, and effects, it is no variance to shew that they were fixtures. *Pitt v. Shew*, 4 *B. & A.* 206. And in trespass for injuring the plaintiff's cart, a variance in the person who was sitting in it is immaterial. *Howard v. Peete*, 2 *Chitty's Rep.* 315. Locking up the plaintiff's goods in a room which he had occupied, and refusing to let him have them till rent is paid, is not an act for which trespass *de bonis &c.* lies. *Hartley v. Moxham*, 3 *Q. B.* 701.

Although, in trespass for taking goods as a distress for rent, the defendant may give his justification in evidence under the general issue by stat. 11 Geo. 2. c. 19. s. 21., yet where the goods have been clandestinely removed from the premises, and afterwards seized by the defendant, the defence must be specially pleaded. *Vaughan v. Davis*, 1 Esp. 257.; *Furneaux v. Fotherby*, 4 Camp. 136.

Evidence on a plea denying property.] This traverse only denies what the plea of Not guilty formerly put in issue; mere possession is therefore still sufficient for the plaintiff as against a wrong-doer. *Ashmore v. Hardy*, 7 C. & P. 501., per Patteson J.; *semb.* accord. *Nicolls v. Bastard*, 2 C. M. & R. 659., in a case of trover. And the plea puts in issue the property, and not merely the possession. *Harrison v. Dixon*, 1 Dowl. & L. 454. Where the plaintiff proved on this issue that he had the goods by sale under an execution against B., the defendant was permitted to shew that the sale was fraudulent, and that he had himself taken them on an execution against B. *Ashby v. Minnitt*, 8 A. & E. 121. In trespass for several articles described in the declaration, if the jury find that some belong to the plaintiff and some to the defendant, the verdict must be entered distributively. *Routledge v. Abbott*, 8 A. & E. 592.

Some of the cases decided upon the new rules, in trover, seem applicable to trespass. See *post*, "Trover."

Evidence on the replication de injuriâ to a plea of justification.] Where, in trespass for taking goods, the defendant justifies under a *fi. fa.* and the plaintiff replies (admitting the writ), *de injuriâ absque residuo*, &c., he may shew that the acts of the defendant were not done really under or in execution of the writ, but for another purpose and under another claim, and that the writ and the proceedings under it were a mere contrivance to get possession of the goods. *Lucas v. Nockells*, 10 Bing. 157. See *antè*, *Price v. Peck*, p. 474. In trespass for taking goods, chattels, and effects, defendant pleaded Not guilty; and as to goods and chattels a distress for rent; and plaintiff denied the tenancy; held, that the plea covered the declaration, and that plaintiff could not shew at the trial that the defendant had taken some *fixtures*; but should have replied that fact. *Twigg v. Potts*, 1 C. M. & R. 89. Trespass for taking goods; plea, removal by defendant because they were incumbering the defendant's room; replication, *de injuriâ*, &c.; held that defendant did not prove his plea by shewing that he locked up the goods in the room and took away the key. *Jones v. Lewis*, 7 C. & P. 343. If this is correctly reported, it would appear that the replication *de injuriâ* did not merely put in issue the possession of the room, and the fact of incumbrance. But in a case where the defendant justified the removal of something which was wrongfully incumbering his close, the Court of Exchequer held that the wrongfulness of the incumbrance was not put in issue, but only the fact. *Breton v. Knight*, Exch. H. T. 1838. In *Newton v. Harland*, 1 M. & G. 644., the Court of C. P. held that a plea, stating a lawful possession of a house and a removal of the plaintiff therefrom, was not supported by proof of a forcible entry by the defendant into his own house which the plaintiff was wrongfully holding over. The principle of this decision seems open to question. See *Browne v. Dawson*, 12 A. & E. 624. cited *infra*.

Where the plaintiff declared for taking his cattle, and the defendant pleaded possession of a close called H. in which they were damage feasant, and plaintiff denied the possession of the said close in which, &c.; held, that it was not enough for the defendant to shew possession of a close called H., without also shewing it to be the close in which the cattle were trespassing. *Bond v. Downton*, 2 A. & E. 26.

Damages.] In trespass for taking goods under process in a place out of the jurisdiction of the court, the plaintiff is entitled to the value of the goods, and not merely to the damage sustained by reason of the taking in a wrong place. *Sowell v. Champion*, 6 A. & E. 407. In trespass for destroying a picture, the defendant may shew under Not guilty that it was a scandalous libel; and the plaintiff shall only recover the value of the canvass and paint; *Du Boz v. Beresford*, 2 Camp. 511.; and *quare*, if he be entitled to recover at all? *Forbes v. Jones*, 4 Esp. 97. Where a landlord distrains privileged goods, and the tenant thereupon pays the rent, he cannot recover, in trespass against the landlord, more than the value of the goods so taken. *Harvey v. Pocock*, 11 M. & W. 740. A vendor, who retakes goods sold to the plaintiff, is liable to the full value, and cannot reduce damages by setting off the unpaid price. *Gillard v. Brittan*, 8 M. & W. 575.

TRESPASS QUARE CLAUSUM FREGIT.

The evidence in this action varies according to the terms of the issue joined between the parties.

Evidence of possession.] In order to maintain this action the plaintiff ought to prove possession, actual or constructive. *Topham v. Dent*, 6 Bing. 516. Any possession is a legal possession as against a wrong-doer. *Graham v. Peat*, 1 East, 246.; *Catteris v. Cowper*, 4 Taunt. 547.; *Oughton v. Seppings*, 1 B. & Ad. 241. But a party who obtains possession by a trespass cannot maintain this action against the person whom he has dispossessed, and who forcibly reinstates himself; and this state of facts may be shewn under a denial of the property in the plaintiff. *Browne v. Dawson*, 12 A. & E. 624. A person occupying crown lands under a parol licence has such a possession as entitles him to maintain trespass against a wrong-doer. *Harper v. Charlesworth*, 4 B. & C. 574. So where overseers enclose waste land without consent of the lord of the manor, they may bring trespass against a mere stranger. *Mulson v. Cook*, 4 New Ca. 392. So if a tenant holds over after the expiration of his lease, or incurs a forfeiture by committing waste or otherwise, yet if the landlord permits him to continue in actual possession he may maintain trespass against any person entering upon him, and not having a better title than himself. *Per Littledale, J., Harper v. Charlesworth*, 4 B. & C. 594.; *Com. Dig. Trespass* (B. 1). But persons, who have merely a right to enter upon the *locus in quo* for the purpose of doing certain acts, cannot maintain trespass. *Dyson v. Collick*, 5 B. & A. 603. Therefore commissioners of sewers under the statute 23 H. 8. c. 5. have not such a possession of their works as will enable them to

maintain trespass for breaking down a wall, or dam, erected by them across a navigable river. *Duke of Newcastle v. Clark*, 8 Taunt. 602. So persons who are authorised by Parliament to make navigable certain rivers, have no interest in the soil of a bank formed of the earth excavated from the channel of a river, so as to entitle them to support trespass for an injury to such bank. *Hollis v. Goldfinch*, 1 B. & C. 205. But where certain private individuals contracted with the proprietors of a navigation to form a canal, and erected a dam of earth and wood upon a close with the permission of the owner for the purpose of completing their work, it was held that they had a sufficient possession to support trespass against a wrong-doer. *Dyson v. Collick*, *supra*. The occasional possession of the key of a chapel in order to preach there is not sufficient to maintain trespass. *Revett v. Brown*, 5 Bing. 7.

Where a party has an interest in the soil, it is not necessary for this action that he should have an exclusive possession. Thus the owner of the soil of a street, dedicated to the public, may maintain trespass for an injury to the freehold; *Lade v. Shepherd*, 2 Stra. 1004.; so also the owner of a market. *Mayor of Northampton v. Ward*, 1 Wils. 107.

Evidence of possession—property or interest in the soil not necessary.] We have seen that an interest in the soil, without an exclusive use of it, is enough to support trespass. On the other hand exclusive possession, without property or interest in the soil, is sufficient for this action: Thus one who has the herbage (*Co. Litt. 4. b. Welden v. Bridgewater*, Cro. Eliz. 421.; *Vin. Ab. (Trespass)*); or the vesture or pasture of a close (*Co. Litt. 4. b. B. N. P. 85.*, *Parker v. Staniland*, 11 East, 366.; *Evans v. Roberts*, 5 B. & C. 837.), may maintain trespass. So a person entitled to the exclusive enjoyment of a crop growing on land during the proper period of its full growth, and until it be cut and carried away, may, in respect of such exclusive possession, maintain trespass. *Per Lord Ellenborough C. J.*, *Crosby v. Wadsworth*, 6 East, 609.; *Tompkinson v. Russell*, 9 Price, 287. So where a person has an exclusive right of digging turves; *Wilson v. Mackreth*, 3 Burr. 1824; or a grant of underwood; *Hoe v. Taylor*, Cro. Eliz. 418. So the owner of a free warren for breaking his free warren. *F. N. B. 86. M.*; *Com. Dig. Trespass, (A. 2.) Lord Dacre v. Tebb*, 2 W. Bl. 1151.; *Smith v. Kemp*; 2 Salk. 637.; but not for breaking his close; *Y. B. 5 H. 7 & 10.*, cited *Welden v. Bridgewater*, Cro. Eliz. 421. And where a meadow is divided annually amongst certain persons by lot, after their several portions are allotted, each has an exclusive possession and may maintain trespass. *Welden v. Bridgewater*, Cro. Eliz. 421.; *Co. Litt. 4. a. 48*. A copyholder has such a possession of the mines under his land as to maintain trespass for taking coals, though there is no injury to the surface. *Lewis v. Branthwaite*, 2 B. & Ad. 437.

Evidence of possession—actual and immediate.] It must appear that the plaintiff was in the actual and immediate possession of the *locus in quo* when the trespass was committed. Therefore an heir before entry, who has only a seisin in law, cannot maintain trespass. *Com. Dig. Trespass (B. 3.)* Nor a bargainee before entry. *Ibid. Barker v. Keat*, 2 Mod. 251. *Geary v. Bearcroft*, Cart. 66.; but see *Anon. Cro. Eliz. 46*. Neither the conusee of a fine (*Berry v. Goodman*, 2 Leon. 147. Arg.), nor a devisee (*Anon. 2 Mod. 7.*, *Geary v. Bearcroft*, Bridgm. Judgm. 495.),

nor a surrenderee (*Br. Ab. Surr.* 50.), nor a reversioner after the expiration of an estate for life or years, (*Keilw.* 163. a., *Com. Dig. Tresp.* (B. 3.) nor a lessee for years (*Keilw.* 163. a., *Bac. Ab. Leases, M.*), can bring trespass before entry. Therefore a mortgagee by a demise for years cannot bring trespass against a stranger before entry; *Wheeler v. Montefiore*, 2 Q. B. 133; nor a parson before induction. *Hare v. Bickley*, *Plowd.* 528. But after induction he may maintain trespass for an injury to the glebe lands, although he has not made an actual entry upon the part on which the trespass was committed; for the act of induction puts him into possession of part for the whole. *Bulwer v. Bulwer*, 2 B. & A. 470. On the determination of a lease at will by the death of the lessee, the lessor may maintain trespass before entry. *Co. Litt.* 62. b.; *Geary v. Bearecroft*, 1 *Lev.* 202. And there are authorities to shew that where land is let at will and a trespass is done to the land, both the lessor and lessee may maintain trespass. *Per* Holroyd J., *Harper v. Charlesworth*, 4 B. & C. 583.; 2 *Roll. Ab.* 551. l. 49.; *Com. Dig. Tresp.* (B. 2.); *Geary v. Bearecroft*, *Bridgm. Judgm.* 496 (n). If a lessee at will commits voluntary waste the lessor may immediately maintain trespass against him; for the committing waste amounts to a determination of the will. *Lady Shrewsbury's case*, 5 *Rep.* 13., b.; *Co. Litt.* 57. a. Where trees are excepted in a lease, the lessor may maintain trespass *quare clausum fregit* against any one who cuts them down; for by the exception of the trees the close on which they grow is excepted also. *Ashmead v. Ranger*, 1 *Ld. Raym.* 552.; *Rolls v. Rock*, 2 *Selw. N. P.* 1342. Actual possession at the time of the trespass done is sufficient; it is not necessary that the plaintiff should be in possession at the time of action brought. 2 *Rel. Ab.* 569. l. 20.

Evidence of possession by relation.] Although to maintain this action the plaintiff must have the immediate possession at the time of the injury, yet there are some cases in which, by the doctrine of relation, the plaintiff is allowed to recover for trespasses committed at a period when he was not in fact in possession. Thus a disseisee, who re-enters, reverts the possession in himself *ab initio*, and may have trespass against the disseisor or a stranger for any act of trespass committed between the disseisin and the re-entry; 2 *Roll. Ab.* 550. l. 7. 554. l. 39.; *Co. Litt.* 257. a.; or committed by the disseisor continuing in possession. *Butcher v. Butcher*, 7 B. & C. 399. But where a fine had been levied with proclamations, the re-entry of the party was held not to revert the possession by relation *ab initio*. *Compere v. Hicks*, 7 T. R. 727.; *Hughes v. Thomas*, 13 *East*, 486. The action of trespass for meane profits affords another instance of the doctrine of relation. See that title, *post*, p. 501.

By stat. 6 Anne, c. 18., guardians, trustees, husbands seized *jure uxoris*, and tenants *per auter vie*, holding over without consent, are declared trespassers, and made liable to the parties entitled for the profits from the expiration of their interests.

Evidence of the ownership of wastes, rivers, walls, ditches, &c.] The waste land adjoining to a public highway is presumed to belong to the owner of the adjoining land, as the highway itself *usque ad medium filum* does, and not to the lord of the manor; but the presumption may be rebutted by acts of ownership, &c. *Steel v. Prickett*, 2 *Stark.* 468. And the rule is the same whether the adjoining land be freehold or copyhold.

Doe v. Pearsey, 7 B. & C. 304.; *Doe v. Kemp*, 7 Bing. 332.; *Cooke v. Green*, 11 Price, 736. But if the strip be contiguous to, or communicate with, open commons or larger portions of land, the presumption is either rebutted or considerably narrowed; for the evidence of ownership, which applies to the larger portions, applies also to the narrow strip which communicates with them. *Grose v. West*, 7 Taunt. 41.; *Headlam v. Hedley, Holt*, N. P. C., 463. Where a road through common land is set out by commissioners under an inclosure act, it is doubtful whether the usual presumption as to right of the owners of the adjoining land applies. *R. v. Edmonton*, 1 M. & Rob. 32. See also *R. v. Wright*, 3 B. & Ad. 681. And it seems that where the herbage of a road is vested by the general inclosure act (41 Geo. 3, c. 109) in the owners of the adjacent allotments, no presumption arises that the soil itself belongs to them. *R. v. Hatfield*, 4 A. & E. 156.

Fresh rivers of common right belong to the owners of the soil adjacent, so that the owners of each side are presumed to have the property of the soil, and the right of fishing, *usque ad filum aquæ*. If a man is owner of the land on both sides, by common presumption he is owner of the whole river. *Hale de Jure Maris*, Harg. Law Tracts, 5. Where two parishes are separated by a river, the *medium filum* is the presumptive boundary between them. *Rex v. Landulph*, 1 M. & Rob. 393.

A wall has been said to differ in point of ownership from a bank; being an artificial edifice the property is presumed to be in him who is bound to repair it; while the property in a bank follows that of the soil from which it is constructed. *Callis on Sewers*, 74., 4th ed.; *D. of Newcastle v. Clark*, 8 Taunt. 602. But where no such liability or act of ownership is shewn, a wall, as well as a bank, ensues the property of the soil.

Where A. licensed B. to build a bridge on his land, and B. covenanted to repair it, it was held that the property in the materials of the bridge, when built and dedicated to the public, continued in B., subject to the right of passage by the public; and that, when severed and taken away by a wrong-doer, B. might obtain trespass for the asportation. *Harrison v. Parker*, 6 East, 154.; see *Spooner v. Brewster*, 3 Bing. 139. If two tenants in severalty build a party wall, one-half of the thickness of which stands on the land of each, (contributed under the building act, 14 Geo. 3. c. 78.) the wall ensues the nature of the land, and the owners of the lands are not tenants in common of the wall, but tenants of divided moieties. *Matts v. Hawkins*, 5 Taunt. 20.; see *Murty v. M'Dermott*, 8 A. & E. 138. But in a case to which the building act does not apply, and where there is no distinct proof of exclusive property as to the whole or part, the common user of a wall, separating adjoining lands belonging to different owners, is *primâ facie* evidence that the wall, and the land on which it stands, belong to the owners of the adjoining lands in equal undivided moieties as tenants in common. *Cubitt v. Porter*, 8 B. & C. 257.

The rule with regard to the ownership of hedges and ditches has been thus stated. Where two adjacent fields are separated by a hedge and a ditch, the hedge *primâ facie* belongs to the owner of the field in which the ditch is not. If there are two ditches, one on each side of the hedge, then the ownership of the hedge can only be shewn by proving acts of ownership. *Guy v. West*, 2 Selw. N. P. 1342. (9th ed.)

No man making a ditch can cut into his neighbour's soil, but usually he cuts to the extremity of his own land; he is of course bound to throw the soil which he digs out upon his own land; therefore, if he afterwards cuts beyond the edge of the ditch, he cuts into his neighbour's land and is a trespasser. *Fowles v. Miller*, 3 *Trent*, 138. The land which constitutes the ditch is therefore part of the close, although it be on the outside of the bank. *Per* Holroyd J., *Doe v. Pearey*, 7 *B. & C.* 308.

It is said that if A. plants a tree at the extreme limits of his own land, and the tree extends its roots into the land of B., A. and B. are tenants in common of the tree; but if all the roots grow in A.'s land, though the boughs shadow the land of B., the property is in A. *Per* Holt C. J., *Waterman v. Soper*, 1 *Ld. Raym.* 737.; *B. N. P.* 85.; 2 *Roll. Rep.* 255. But according to another authority, if a tree grows in A.'s close and roots in B.'s, yet, the body of the main part of the tree being in the soil of A., all the residue of the tree belongs to him. *Masters v. Pollie*, 2 *Roll. Rep.* 141. In a late case, Littledale J. ruled, that the tree belongs to him in whose soil it was first sown or planted. *Holder v. Coates*, *M. & M.* 112.; and see note, *ibid.* The property in trees is in the landlord; the property in bushes, even where they have been cut down by a stranger, in the tenant; therefore the landlord cannot bring trespass *de bonis*, &c. to recover their cuttings. *Berriman v. Peacock*, 9 *Bing.* 384.

Acts of ownership.] The proof of ownership by documentary and other assertions of right is treated of *anté*, p. 32. Cutting down trees is evidence of right to the soil. *Vin. Ab. Evid. T. b.* 102. A perambulation made by the lord is evidence of the limits of a manor, and it is not necessary that any person, against whom it operates, should be present at or know of it. *Woolway v. Rowe*, 1 *A. & E.* 114. Indeed any act done upon the land is admissible. *Ib.* 117. And such acts are not evidence on the ground of acquiescence, but as showing possession. *Per* Parke B., in *Jones v. Williams*, 2 *M. & W.* 328. The acts of tenants may be evidence against their reversioners, where their declarations are not. *Tickle v. Brown*, 4 *A. & E.* 369., cited *anté*, p. 36. And acts in one place may be evidence of ownership in another, where there is a common character of locality; thus cutting timber in a wood or close is evidence of title to the whole wood or close; so of a continuous hedge; or different parts of the bed of a river, &c. *Jones v. Williams*, 2 *M. & W.* 328. See further *anté*, p. 53, 54.

Where the surface and the minerals are several inheritances (as is common in mining counties), the user or ownership of one is no evidence of property in the other. *Rowe v. Grenfel*, *R. & M.* 396.; *Rich v. Johnson*, 2 *Stra.* 1142.; *Hodgkinson v. Fletcher*, 3 *Doug.* 31. Working in one part of a mine is possession of the whole. *Wild v. Holt*, 9 *M. & W.* 672. So working under part of a demised tract of land is evidence of the possession of mines under the whole. *Taylor v. Parry*, 1 *M. & G.* 604.

Evidence of the locality of the premises — abutments, &c.] The venue in this action is local; therefore trespass will not lie for breaking and entering a house out of the realm. *Doulson v. Matthews*, 4 *T. R.* 503. It was formerly not necessary to name or to specify the abutments of the

locus in quo; but now by the rules of H. 4 Wm. 4., the close or place in which, &c. must be designated in the declaration by name or abutments or other description; in failure whereof the defendant may demur specially. Where the close is so named or described by its abutments, a material variance will be fatal, unless amended. Thus, if the description be "on the south side, abutting on the mill of A.," the plaintiff must prove a mill there in the tenure of A.; but it will be sufficient though there be a highway between them. 2 *Roll. Ab.* 678., l. 10.; *B. N. P.* 89. Where the plaintiff claims the divided half of a party wall, he should describe it as abutting on a wall of the defendant, and not on the defendant's buildings erected against it; for this would describe the *whole* wall. *Semb. Murly v. McDermott*, 8 *A. & E.* 138. Extreme strictness is not observed in the proof of abutments; thus, if a close be described as abutting towards the east, and it proves to be north inclining to east, the proof is sufficient. 2 *Roll. Ab.* 678., l. 13.; *Roberts v. Kerr*, 1 *Taunt.* 501. Where the close was described as abutting in the direction of the four cardinal points *towards* certain other closes, and it appeared that it was a *triangular* close, it was held to be within the description. *Semb. Lempriere v. Humphrey*, 3 *A. & E.* 181. Where part of a lane, called Cow Lane, has been added to a field of the plaintiff, called Hall Close, the whole may be properly described as Hall Close. *Brownlow v. Tomkinson*, 1 *M. & G.* 484. The insufficient statement of abutments is not an objection at *Nisi Prius*. *S. C. ib.* Where the close is stated to be situate in a certain parish, the proof must correspond with the statement. *Taylor v. Hooman*, 1 *B. Moore*, 161. If it is stated to be in the parish of A., it is enough if A. has a church and overseers of its own, though perhaps, strictly speaking, it may only be a hamlet; in such an action the court will not try a question of parochiality. *Anon.*, 2 *Camp.* 5. See *anté*, p. 417.

Evidence of trespass committed by defendant.] Trespass lies against the party who did the trespass and all aiding him; *Com. Dig. Tresp.* (C. 1.); and a person may become a trespasser by previous command, or, where the trespass has been committed for his use and benefit, by subsequent assent. *Barker v. Braham*, 3 *Wils.* 377. But in cases of subsequent assent, it must appear that the trespass was for his use. *Wilson v. Barker*, 4 *B. & Ad.* 614., *anté*, p. 480. A *feme covert* and an infant cannot make themselves trespassers, either by prior command or subsequent assent. *Co. Litt.* 180., *b. note* (4.), 357. *b.* Trespass lies against a tenant in common with the plaintiff for destroying a common wall; but not for pulling it down with intent to rebuild, or for raising its height. *Cubitt v. Porter*, 8 *B. & C.* 257. Trespass lies against a corporation aggregate; as where the agent of a canal company broke and entered locks on it, and took the plaintiff's barges. *Mauud v. Monmouth Canal Co.*, 4 *M. & G.* 452. A master is not liable for the *wilful* trespass of his servant. 2 *Roll. Ab.* 553. l. 25.; *Chandler v. Broughton*, 1 *C. & M.* 29. Thus where a servant is authorised to distrain cattle damage feasant, and he unlawfully drives the plaintiff's cattle into his master's close, and then distrains them, the master is not liable in trespass. *Lyons v. Martin*, 8 *A. & E.* 512. But where he orders his servant to do an act the natural consequence of which is a trespass, and the servant uses ordinary care in the execution of the order, the

master is liable though he directs the servant not to trespass. *Gregory v. Facer*, 3 B. & C. 351. See further on the liability of master for the acts of his servant, *supra*, p. 332, 333. A party is liable for the acts of his servant on proof of retention; thus, A. employed B., an attorney, to enforce payment of a debt: B. directed his agent to sue out a writ in the county court: before the return of the writ, the sheriff paid the debt and costs to B.: his agent, not knowing of such payment, afterwards entered in judgment in the county court and sued out execution under which the trespass was committed; it was held that both A. and B. were liable as trespassers. *Notes v. Pilling*, 6 B. & C. 36; see also *Cruik v. Wright*, B. & M. 278. But where the attorney delivers a writ of execution to an officer who executes it by entering a house out of the jurisdiction, the attorney is not liable, though he may have had reason to believe it would be so executed. *Smith v. Clappam*, 6 A. & E. 417. Where a writ is set aside for irregularity, both attorney and principal are liable in trespass. *Codrington v. Light*, 5 A. & E. 443.

The owner of animals *whether vitæ or bestię* is liable for trespasses committed by them in the land of another: *Keir*, 34, *Com. Dig. Tresp.* (C.); but a person from whose land animals *feræ naturę*, as rabbits, &c. escape, is not liable for such injury. *Brown's case*, 5 Rep. 104. b.; *Cropper v. Marshall*, 1 Barr. 239; *Beckwith v. Sharple*, 4 Barr. 2093. See further *supra*, p. 333.

Trespass ab initio. Where the defendant enters under an authority in law, the plaintiff may show that he has abused such authority and so become a trespasser *ab initio*; but a mere non-feasance will not be such an abuse. *Sir Carpenters' case*, 8 Rep. 146. a. A lessor who enters to view waste and does damage, or stays all night; a commoner who enters to view his cattle, and cuts down a tree; a man who enters a tavern and continues there all night against the will of the landlord, are all trespassers *ab initio*. *Com. Dig. Tresp.* (C. 2). So an officer who neglects to remove goods attached within a reasonable time, and continues on the premises in possession. *Reed v. Harrison*, 2 W. Bl. 1215; *Aikenhead v. Davies*, 5 Tenter. 198. See also *Ladd v. Thomas*, 12 A. & E. 117. A person distraining who remains in possession above the five days, and disturbs the party, is now (since 11 Geo. 2. c. 19. s. 19.) a trespasser for the period only during which he remains in possession after the five days expired: at common law a subsequent irregularity made him a trespasser *ab initio*. *Winterbourne v. Morgan*, 11 East, 395; *Messing v. Keble*, 2 Camp. 115. A tenant tendering his rent after distress, but before impounding, may maintain trespass for a subsequent removal of the distress. *Ferne v. Beasley*, 1 M. & Rob. 21. But it is otherwise if the tender is after impounding, whether for rent-arriere or damage feasant. *Ladd v. Thomas*, 12 A. & E. 117. A landlord who enters to distress does not become a trespasser *ab initio* by taking some privileged goods. *Harvey v. Pocock*, 11 M. & W. 740.

The abuse of an authority in fact will not in general render the party a trespasser *ab initio*. *Sir Carpenters' case*, 8 Rep. 146. b. And where the officer of a court, acting under process, commits a subsequent breach of duty, this does not make him a trespasser *ab initio*. *Smith v. Eggington*, 7 A. & E. 167.

When the plaintiff relies on an act which makes the defendant a

trespasser *ab initio*, he must reply it; and where the abuse is a substantive trespass, but not one which makes a trespass *ab initio*, it must be newly assigned. 1 *Will. Saund.* 300. n.; *Smith v. Egginton*, 7 A. & E. 167.

Evidence under alia enormia—Damages.] In trespass for breaking and entering the plaintiff's house, evidence that the defendant also debauched the plaintiff's daughter has been allowed under *alia enormia*. *Per Holt C. J.*, *Russel v. Corn*, 6 *Mod.* 127.; *Ca. temp. Holt*, 699.; *B. N. P.* 89. But it is said to be the safest rule not to admit, under this general averment, proof of such facts as the debauching of a daughter entirely unconnected with, and distinct from, the substantive ground of action, though, in point of time, the one may have immediately followed the other. 2 *Phill. Evid.* 185. In trespass for breaking and entering the house of the plaintiff, he may give in evidence that his wife was so terrified that she was immediately taken ill, and soon afterwards died; but this evidence was held admissible only for the purpose of showing how outrageous and violent the trespass was, and not as a substantive ground of damage. *Huxley v. Berg*, 1 *Stark.* 98. So where the plaintiff declared against the defendant for breaking and entering her house, and, under a false charge that the plaintiff had stolen property in her house, ransacking and searching, &c., whereby she was injured in her credit, it was held that the declaration was good, and that the jury might give damages for the trespass as aggravated by the false charge. *Bracegirdle v. Orford*, 2 *M. & S.* 77. The jury may consider not only the pecuniary damage sustained by the plaintiff, but also the intention with which the fact has been done, whether for insult or injury. *Per Abbott J.*, *Sears v. Lyons*, 2 *Stark.* 318.; *Merest v. Harvey*, 1 *Marsh*, 139.

Where the plaintiff complains of breaking his house and taking away "goods therein," not alleging them to be *his* goods, he cannot claim damage for the taking. *Prichard v. Long*, 9 *M. & W.* 666.

In trespass for cutting away part of the plaintiff's land, the defendant is bound to pay the value of the land cut away, but not the expense of reinstating it. *Jones v. Gooday*, 8 *M. & W.* 146. See *Holmes v. Wilson*, 10 A. & E. 503. In trespass for breaking a mine and taking the plaintiff's coal, the plaintiff is entitled, as against a mere wrong-doer, to the value of the coal when it first existed as a chattel without deducting the expense of getting it. *Wild v. Holt*, 9 *M. & W.* 672. But the expense of afterwards bringing it to the pit's mouth must be allowed; for the plaintiff cannot profit by the increased value caused by the removal. *Morgan v. Powell*, 3 Q. B. 278. And where there is a *bonâ fide* disputed title and no fraud, the jury should give only the fair value as if the defendant had bought it of the plaintiff. *Wood v. Morewood*, *ib.* 440. (n.)

The defendant may show circumstances which he could not have pleaded in justification; as, in trespass for cutting trees, that they were applied to purposes for which the plaintiff had covenanted to furnish timber. *Rennell v. Wither*, *Manning's Index*, 291., 2d ed. But *semb. contrâ*. *Simmons v. Norton*, 7 *Bing.* 640. A recovery against a co-trespasser not joined is not admissible in mitigation, unless specially pleaded as a bar. *Day v. Porter*, 2 *M. & Rob.* 151.

Evidence under the general issue.] Under the general issue the defendant might formerly have given evidence of title in himself; or he

might have proved that the freehold and right of possession were in a third person, by whose command he entered. *A gent v. Durrant*, 8 T. R. 403. Or that he was tenant in common with the plaintiff; or that a third person, by whose command he entered, was tenant in common. *Rosse's case*, 3 Leon. 53. And this was an answer unless the cotenant had destroyed the joint property, as by grubbing up a hedge. *Voyce v. Voyce*, Gow. 201. But even before the new rules every matter of justification or excuse must have been pleaded specially; as a right of common: way, or easement; defect of fences; licence; authority in law; and all matters in discharge of the action, as accord and satisfaction, &c. Nor could the defendant have proved as a bar that the plaintiff was joint-tenant, or tenant in common of the *locus in quo*, with a third person, which is matter of plea in abatement. *Brown v. Hedges*, 1 Salk. 290.; *B. N. P.* 91.

But now by the rules, 4 W. 4., in actions of trespass *q. c. f.*, the plea of Not guilty operates as a denial that the defendant committed the trespass alleged in the place mentioned; but not as a denial of the plaintiff's possession, or right of possession, which, if intended to be denied, must be traversed specially.

By various statutes particular persons are enabled to give special matter in evidence under the general issue; parties distraining for rent arrear by 11 Geo. 2. c. 19. s. 21.; justices of the peace, mayors, constables, &c. by 7 Jac. 1. c. 5.; churchwardens and overseers by 21 Jac. 1. c. 12.; surveyors of highways by 5 & 6 Wm. 4. c. 50. s. 109. See further, "*Actions against Constables*," "*Justices*," &c. *post*, Part III.

In these and other cases where the plea is given by statute, the new rules do not deprive the defendant of the right to avail himself of it, provided he inserts in the margin of the plea the words, "by statute." *R. T.* 1 *Fict.*

Every thing lawfully done for the purpose of distraining for rent, as the breaking an outer door by force after having previously entered peaceably and been expelled by the plaintiff, may be shewn under Not guilty. *Eagleton v. Gutteridge*, 11 M. & W. 465.

Evidence on the plea of liberum tenementum.] Where the defendant pleads *liberum tenementum* in himself or a third person by whose command he entered, on which issue is joined, the issue is upon him. *Pearson v. Coles*, 1 M. & Rob. 206. It puts the defendant on proof of a freehold interest; 1 Saund. 347. d. (s); and denies the plaintiff's right of possession, but admits the fact of the plaintiff's possession, and asserts the defendant's right to the possession. *Doe v. Wright*, 10 A. & E. 763.; *Lempriere v. Humphrey*, 3 A. & E. 186. The declarations of the owner after the trespass are not evidence of the defendant's authority. *Garr v. Fletcher*, 2 Stark. 71.

It was unsettled whether, on issue joined on this plea, the plaintiff might show a title by the old statute of limitations. *Lowe v. Govett*, 3 B. & Ad. 863. The late act extinguishes the right of the person barred by it, and therefore seems to be an answer on this issue. See *sect.* 34. *antè*, p. 449. 451. The plea is not supported by proof of acts of ownership for less than twenty years, where it appears that there was a title in a third party within that period. *Brest v. Lever*, 7 M. & W. 593.

Formerly, where the plaintiff declared generally for a trespass to his close in A. without naming the close, and the defendant pleaded *lib.*

ten., upon which the plaintiff took issue, it was sufficient for the defendant to prove a freehold in himself anywhere in A., to entitle him to a verdict. 1 *Saund.* 299. b. (n). The plaintiff in such case should have new assigned, setting out the name or abutments of the *locus in quo*. But if the plaintiff names the real name of the close in his declaration, and the defendant pleads *lib. ten.* generally without setting out the abutments of the close, upon which issue is joined, the plaintiff may recover on proving a trespass done to a close in his possession bearing the name stated in the declaration, though the defendant may have a close in the same parish known by the same name; and it will not therefore be necessary for the plaintiff to new assign. *Cocker v. Crompton*, 1 B. & C. 489.; *Cooke v. Jackson*, 9 D. & R. 495. In order to compel a new assignment, defendant must give a further description of the close. *Cocker v. Crompton*, *supra*. The same rule applies where the close is described by abutments instead of a name. *Lempriere v. Humphrey*, 3 A. & E. 181. The new rules of pleading have made no alteration in the effect of the plea of *lib. ten.* *Lempriere v. Humphrey*, *supra*. But as the declaration is now required to name or describe the close, the plea of *lib. ten.* ought now, in strictness, to be forborne. See the cases cited *supra*, *Cocker v. Crompton*; *Lempriere v. Humphrey*, and 1 *Saund.* 299. c. (n).

The plea of *lib. ten.* is divisible; and if the declaration is for trespass to three closes, to which defendant pleads *lib. ten.* in all, and plaintiff replies a title to all, the verdict may be for plaintiff as to two, and for defendant as to one close. *Phythian v. White*, 1 M. & W. 216. The plea only puts the defendant to proof that that part of the close in which the trespass was committed is his freehold. *Smith v. Royston*, 8 M. & W. 381.

[Evidence under a plea denying plaintiff's property or possession.] The plea either denies that the close is the plaintiff's; or, that the plaintiff was possessed of the close: in either case mere possession will support the plaintiff's case, if the defendant be a wrong-doer. Where the plea only traverses the plaintiff's possession (as it may do, *Fleming v. Cooper*, 5 A. & E. 221.), there is no authority to show that the defendant can set up a title in himself; but where the plea is a denial that it is the close of the plaintiff, Parke B., in *Purnell v. Young*, 3 M. & W. 288., was of opinion it had the same effect as a plea of Not guilty at common law, and therefore enabled the defendant to shew title in himself; and the same opinion has been recently upheld in the court of Exchequer. *Harrison v. Dixon*, 1 Dowl. & L. 457. But in *Whittington v. Boxall*, T. T. 1843, the Court of Q. B. ruled that such a plea put only the possession in issue, and that a title in the defendant, or another, should be specially pleaded. See also *Heath v. Milward*, 2 New Ca. 98.

Where a mortgagee is not to enter till default, and he brings trespass against a third party before such entry, the defendant is entitled to a verdict on a plea denying that the land is the land of the plaintiff. *Wheeler v. Montefiore*, 2 Q. B. 133.

A verdict against the plaintiff in trover for ore is not conclusive against him in another action against the same defendant, to try the rights to the mines. Per Lord Ellenborough C. J., *Curtis v. Daniel*, 10 East, 277.

Under either form of plea the abutments, or other description of the

close, are put in issue. *Mary v. McDermott*, 6 A. & E. 138.; *Weller v. Richards*, 1 Q. B. 439.

Evidence under plea of justification and replication de injuriis, &c.] Where to a plea of justification the plaintiff has replied *de injuriis obrepere tali causa*, the whole matter of the plea is put in issue, and must be proved so far as it is material to constitute a justification. The plaintiff declared for breaking and entering his dwelling-house, assaulting and imprisoning him, and during his imprisonment striking him in a violent manner; the defendant pleaded a justification of the entry and arrest under a warrant, and because the plaintiff, after he had been so taken into custody, conducted himself in a violent manner and could not otherwise be kept in custody, the defendant was obliged to give him a few blows, &c.; a battery during the imprisonment was proved, but the defendant, though he proved the arrest, gave no evidence of violent conduct by the plaintiff while in custody; it was held that the plea was not proved, and that a new assignment was not necessary. *Phillips v. Houghton*, 5 B. & A. 220. See ante, *Trespass for assault*, p. 471. In trespass for breaking plaintiff's house defendant justified entry under civil process, "the outer door being open;" held that the replication *de injuriis* puts in issue the fact of the door being open, without a special replication or new assignment. *Kerby v. Denby*, 1 M. & W. 336. But where the plea consists of two facts, either of which, if separately pleaded, amounts to a good defence, it will be sufficient for the defendant to prove either of them. *Spilbury v. Mitchell*, 1 Tass. 146.; accord. *Baile v. Keil*, 4 New Ca. 650. It is sufficient to prove so much of the plea as covers the declaration; and other matters, alleged in the plea unnecessarily, need not be proved. *Aitken v. Warr*, 1 C. M. & R. 827. And it is enough to prove a justification which covers the trespass, although it does not cover mere matter of aggravation. Thus where the plaintiff declares for breaking, entering and expelling, and the defendant justifies only the breaking and entering, it is sufficient; for the breaking and entering are the gist of the action, and the expulsion is only matter of aggravation. If the plaintiff wishes to take advantage of the expulsion, he should shew the special matter in a new assignment. *Taylor v. Cole*, 3 T. R. 292.; S. C. 1 H. Bl. 555. This case was decided on demurrer to the plea, and has been cited to show that expulsion alone is not a trespass on the land, though it may make an entry a trespass *ad initia*. See *Cabitt v. Porter*, 8 B. & C. 257. 269. So where to trespass for breaking and entering a house, and staying therein three weeks, the defendant pleaded a justification as to breaking and entering and staying in the house twenty-four hours, and it was proved he stayed in the house more than twenty-four hours, Lord Eilenborough held that the justification was proved, and that if the plaintiff meant to rely upon the excess beyond the twenty-four hours, he ought to have said so by a new assignment. *Monperrant v. Smith*, 2 Camp. 175. See also *Lambert v. Hodgson*, 1 Bag. 317.; 1 Sand. 28. a. (n.) Declaration for breaking the plaintiff's house and taking his "goods, chattels, and effects;" plea, Not guilty; and secondly, a justification of the taking of the "goods and chattels" for rent due on a tenancy: the replication denied the tenancy; held, that the plaintiff could not on this issue show that some of the effects taken were fixtures and not distrainable; but should have replied it. *Thigg v.*

Potts, 1 C. M. & R. 89. But where the plaintiff declared for entering his house and taking his goods and throwing them out of a barn, and the defendant pleaded a justification as to all except the throwing out of the barn; held, that the plaintiff was entitled to a verdict and damages as to the part excepted, though it was contended that it was mere aggravation. *Neville v. Cooper*, 2 C. & M. 329.

The plaintiff declared in trespass for breaking his close, and set out the close by abutments; the defendant justified, alleging that the said close in which, &c. was part of an allotment of six acres made by commissioners duly authorised for certain purposes, in execution of which he entered; the plaintiff replied that the said close in which, &c. was not part of the six acres in the plea supposed to have been allotted, and thereupon issue was joined. It appeared that the close set out by abutments was not *all* within the allotment, but that the part in which the actual trespass was committed was within it; it was held that the justification was made out; *Bassett v. Mitchell*, 2 B. & Ad. 99.; for the words "close in which, &c." mean that part of the close described, in which the trespass is proved to have been committed, and if the record should be used in a future action, either party might narrow its effect by evidence of the part to which it applied. *S. C. ib.* 104, 105. See the cases, *post*.

Trespass for breaking and entering a house; plea, entry to take goods under a fi. fa.; replication, admitting the writ, delivery of it, and the warrant, and alleging that the defendant *de injuriâ absque residuo*, &c. committed the trespass; issue thereon. Held that the seizure under the warrant was not admitted by the plaintiff, but should be proved by the defendant, and that the plaintiff might in answer prove the seizure to have been colourable only, and therefore no seizure. *Carnaby v. Welby*, 8 A. & E. 872.

Evidence on plea of right of way.] The cases in which the grant of a way (*antè*, p. 22.), and the dedication of a way to the public (*antè*, p. 23.), will be presumed, have been already stated; and other cases applicable to this head will be found under the head "*Case for Disturbance of Way*," *antè*, p. 342. If the defendant pleads a right of way, and the plaintiff denies the right, the latter may prove that the way has been duly stopped. *Davison v. Gill*, 1 East. 64. But upon a traverse of the right of way, the plaintiff will not be allowed to shew that the trespass committed by the defendant was not covered by the supposed right of way. Thus, where the defendant pleaded that he was seised in fee of a messuage, and prescribed for a right of way over the *locus in quo* as appertaining thereto, and the plaintiff traversed the prescriptive right, it was held that proof of the defendant's seisin in fee of an ancient messuage, to which a right of way, as pleaded, over the *locus in quo* belonged, was sufficient to support his plea, though the messuage was in the occupation of a tenant, and the defendant only occupied a new-built house in the parish at the time of the trespass committed. *Stott v. Stott*, 16 East, 343. If the plaintiff meant to insist that the right stated would not cover the exercise of a right of way to the new house, he should have done so either by a new assignment, or by a special replication to that effect. *Ibid.* 349.

In some cases it is proper both to reply and to new assign. Where the plea, on the face of it, professes to answer the whole matter of the

declaration, but in fact only answers part; as where, to a declaration for a trespass to a close called A., the defendant pleads a right of way over A., and in the exercise of such right justifies the acts complained of, but in fact the defendant not only entered upon that part of A. over which the way passes, but also on other parts of A., the plea has only "hit some of the places wherein the plaintiff intended the trespass," and the trespasses in the other part of the close remain unanswered. *Prettyman v. Lawrence*, Cro. Eliz. 812.; *Odiham v. Smith*, Cro. Eliz. 589. In such a case the plaintiff may not only traverse the right, but may at the same time new assign *extra viam*, and thus entitle himself to give evidence of trespasses committed in every part of the close. 1 *Saund.* 300 (n). To trespass *q. c. f.* defendant pleaded a right of way in the close; new assignment *extra* the way; plea, that the plaintiff had obstructed it, and therefore defendant deviated; replication *de injuriâ*, &c. Held, that plaintiff might shew that there was an admitted way over the close which he had not obstructed, and defendant could not obtain a verdict by shewing a disputed way over it, which had been obstructed. *Kilison v. Isles*, 11 A. & E. 665. Trespass, *q. c. f.* and pulling down posts in the close; plea, a public way and removal of the posts obstructing it; on a traverse of the way, defendant may shew any public way over the close, and is not bound to shew that it crossed the part where the posts stood. *Webber v. Sparkes*, 10 M. & W. 485.

Where the defendant pleaded a prescriptive right of way from his own close "next adjoining to the said closes in which," &c. unto, into, through, over and along the said closes in which, &c.; and it appeared that his own close did in one part adjoin the plaintiff's, but that the way passed over the land of a third person between the close of the defendant and the closes in which, &c., it was held that the plea was sufficiently proved. *Simpson v. Lewthwaite*, 3 B. & Ad. 226. So an alleged way from A. to B. does not pledge the defendant to prove a direct road. *R. v. Marches. of Downshire*, 4 A. & E. 232. But if the plea alleges an immemorial way, and it is shewn that part was recently dedicated, it is a variance. *S. C. ib.* Mere evidence of user without other proof of a grant, the parties to it, &c., is not enough to support an alleged lost grant of a way; it is proof of a prescription, if any thing. *Blewett v. Tregonning*, 3 A. & E. 554.

Where the defendant pleaded that A. B. was seised in fee, and, being so seised, granted a right of way by non-existing grant, and the plaintiff traversed the grant, it was held not competent for the plaintiff upon that issue to shew that A. B. was not seised in fee for the purpose of rebutting the presumption of the grant; he being estopped by the admission on record. *Cowlishaw v. Cheslyn*, 1 C. & J. 48. But this decision is doubted; *Blewett v. Tregonning*, 3 A. & E. 554.; and seems at variance with the doctrine held in some of the cases cited, *antè*, p. 49.; and it should rather seem that the seisin was only so far admitted as to enable the defendant to have a verdict, if he proved the grant.

A plea of right of way stated a conveyance in fee of a tenement to the defendant, "with all ways then used by the tenants and occupiers thereof," and that the defendant, "being so seised and having occasion to use the way," committed the trespass. The replication traversed the user of the way at the time of the conveyance, and there was a new assignment that the defendant used the way for other purposes, to which the defendant pleaded Not guilty. The right of way was esta-

blished in evidence, but it appeared that when the trespass was committed the tenement was in the possession of a tenant, and that the defendant, as landlord, went over the *locus in quo* to remove an obstruction to the way: Held, that the defendant had a right so to use the way, and that the language of the plea comprehended all the purposes for which a person seized of the tenement might lawfully use the way. *Proud v. Hollis*, 1 B. & C. 8. A plea of footway is supported by a right of carriage way; for the latter includes the former; per Lord Denman C. J., *Davies v. Stephens*, 7 C. & P. 570. The extent of the right is in all cases for the jury, and may be disputed under the traverse without any new assignment; thus, if the defendant pleads a right generally, the plaintiff may shew that it is confined to certain purposes, and that the defendant used it for another purpose; and proof of user for farming purposes is evidence of a right for all purposes. *Cowling v. Higginson*, 4 M. & W. 245. The grant of a right of way may be explained by evidence of the state of the premises at the time of the grant; but not by the act or declarations of the parties before or after, unless there be a doubt which of two ways be intended. Per Parke B., in *Osborn v. Wisc*, 7 C. & P. 761. Proof of a public way is not inconsistent with the fact that it is also a private way. *Brownlow v. Tomlinson*, 1 M. & G. 484. The reservation of a way to an open space, "under a loft, and now used as a woodhouse," cannot be extended to the use of it for going to a house subsequently built on the space. *Allan v. Gomme*, 11 A. & E. 760. There were in this case expressions in the conveyance tending to shew that the *locus* was to continue an open space. It was, however, held that the defendant was not bound to use it as a woodhouse only. *S. C. ib.* It was also held that, the plaintiff having new assigned the user of the way for unauthorised purposes, to which the defendant pleaded a justification of the user with a traverse that he had trespassed *modo et forma*, the plea amounted to Not guilty, and the justification was not admissible under it. *S. C. ib.*

By the rules of Hilary Term, 4 W. 4., it is provided that "where in an action of trespass *quare clausum fregit* the defendant pleads a right of way with carriages and cattle and on foot in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if a right of way with cattle, or on foot only, shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found; and for the plaintiff in respect of such of the trespasses as shall not be so justified. And in all actions in which such right of way, or other similar right, is so pleaded that the allegations, as to the extent of the right, are capable of being construed distributively, they shall be taken distributively." *Ante*, p. 63.

Since this rule, it has been held that a plea of right of way to fetch water and goods may be found for the defendant as to the water, and for the plaintiff as to the goods. *Knight v. Woore*, 3 New Ca. 3. But where the plea claimed a general right of way with carts, horses, &c. in respect of close K., and the proof was of a right to cart timber only from close K., it was held that the plaintiff was entitled to the entire verdict; for the right proved was a qualified right, and not part of the right alleged. *Higham v. Rabett*, 5 New Ca. 622. A right to lead manure is not supported by proof of a footway, and cattle-way; for "leading" implies the use of a carriage. *Brunton v. Hall*, 1 Q. B. 792.

The time of prescription with regard to rights of way is now altered by 2 & 3 W. 4. c. 71., the provisions of which have been already partially stated, *antè*, p. 342., where also some of the decided cases will be found. The 5th section relates more particularly to pleadings in actions of trespass. By that section it is enacted, that in all pleadings to actions of trespass, and in all other pleadings, wherein, before the passing of the act, it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof, as of right, by the occupiers of the tenements in respect whereof the same is claimed for and during such of the periods mentioned in the act as may be applicable to the case, without claiming in the name or right of the owner of the fee as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.

The cases cited, *antè*, p. 360, 361, 362., together with that of *Beasley v. Clarke*, 2 New Ca. 705., and *Tickle v. Brown*, 4 A. & E. 369., shew that an agreement or licence within the period pleaded is evidence for the plaintiff on a traverse of the enjoyment, on the principle that it breaks the continuity of enjoyment and so disproves the plea.

In *Tickle v. Brown*, it was further held that the enjoyment meant by the statute is an open, notoricius one, without particular leave, by one who claims without danger of being treated as trespasser, whether the right claimed be strictly legal, as by prescription and adverse user; or by deed; or though not strictly legal, yet lawful to the extent of excusing a trespass, as by consent in writing not under seal in case of a plea of forty years, or by written or parol consent in case of a plea of twenty years. But a licence in writing, if it covers the *whole* period of forty years, must be pleaded; so of a licence by parol, if it covers the *whole* period of twenty years.

It seems that evidence of payments made for the use of the way, though inadmissible to prove that it originated in an agreement before the period began to run, is admissible to shew the precarious nature of the subsequent enjoyment, and to explain an interruption by non-user. *S. C. ibid.* Proof of a licence to the defendant just before the commencement of the period is evidence against him under the common traverse. *Clay v. Shackeray*, 2 M. & Rob. 245. On a plea of forty years' user the defendant may go further back in his evidence, and thus may supply proof of user at the beginning of the period of forty years. *Lawson v. Langley*, 4 A. & E. 890. On a traverse of a right of way by user for twenty years, the plaintiff cannot shew that it was enjoyed for part of the time under an act of parliament, and that the right had ceased; for a special replication is necessary. *Kinlock v. Neville*, 6 M. & W. 795. A plea stated an enjoyment for thirty years next before the action; the replication stated a life-estate in the land for part of the said thirty years; rejoinder, that the life-estate did not continue during any part of the said thirty years' issue thereon. Held that the defendant might support his plea by shewing enjoyment for two periods, one next before, the other next after, the life-estate, amounting together

to thirty years. *Clayton v. Corby*, 2 Q. B. 813. Unity of possession is evidence on a traverse of the way; for it breaks the continuity of the enjoyment of the easement *as such*. *S. C. ibid.*

Evidence on plea of right of common.] On a right of common pleaded, the plaintiff may either deny the prescriptive or other right stated in the plea, or he may traverse the measure of the common, *viz.* that the cattle were the defendant's own cattle, and that they were levant and couchant upon the premises, and commonable cattle. *Robinson v. Raley*, 1 Burr. 316.; *B. N. P.* 23. But under this latter replication the plaintiff will fail if it appear that *some* of the cattle were the defendant's commonable cattle levant and couchant; for the number mentioned in the declaration is not material; 1 *Saund.* 346. *c. (n)*; *Ellis v. Rowles, Willes*, 638. The plaintiff in such case should new assign; and it will not be enough to deny that *all* the cattle were levant and couchant; for this amounts only to a denial that *any* were so. *Bowen v. Jenkin*, 6 A. & E. 911.

The plaintiff may reply an approvement of the common, if it be common of pasture; *Glover v. Lanc*, 3 T. R. 445.; 1 *Saund.* 353. *b. (n)*; or that the common has been inclosed for upwards of twenty years; and if issue be taken on this replication, and it appear in evidence that *part* of the common has been inclosed for twenty years, and that the trespasses were in fact committed in such part, the plaintiff is entitled to recover for such trespasses though the rest of the common is uninclosed. *Tapley v. Wainwright*, 5 B. & Ad. 395., overruling the dictum of the Court in *Hawke v. Bacon*, 2 Taunt. 157. And it has been held that upon issue joined on the right of common, the plaintiff may prove a legal extinction of the right over the *locus in quo* before the exercise of it by the defendant; thus he may prove a custom for the lord of the manor to inclose parcels of the waste, and a grant to himself of the *locus in quo* under such custom. *Arlett v. Ellis*, 7 B. & C. 346.

In trespass for breaking and entering the plaintiff's close and throwing down fences the defendant in his plea prescribed for a right of common of pasture on a down whereof the close was parcel, and justified the trespass because the close in which, &c. was wrongfully inclosed; the plaintiff replied, that the close in which, &c. was a close called *Burgey Cleave Garden*, and had for thirty years and more been separated and inclosed from the down, and enjoyed all that time in severalty, and adversely to the person holding the land in respect of which the right of common was claimed; the defendant rejoined that the close in which, &c. had not been enjoyed for thirty years or upwards in severalty or adversely; and the jury found that *part* of the garden had been inclosed *within* the thirty years, and that the trespass was committed in that part of the garden only: Held that the defendant was entitled to the verdict; for if the word "close" was an entire allegation, it comprehended the whole of *Burgey Cleave Garden*, and then the plaintiff was bound to prove that the whole had been inclosed upwards of thirty years; or, if it was a divisible allegation, it was confined in its meaning to the spot in which the trespass had been committed, and which the jury found had not been inclosed thirty years; *Richards v. Peake*, 2 B. & C. 918.; and it has been since settled that the allegation is divisible, and means only the particular place in which the trespass was committed. *Tapley v. Wainwright*, 5 B. & Ad.

398. *Antè*, p. 490. But a prescription is an entire thing, and (except in cases helped by the late rules of pleading) must be proved to its full extent, *antè*, p. 62. Thus where the plaintiff declares for a trespass and digging stones in C., and the defendant pleads a prescriptive right to dig in a certain waste containing (among others) close C., and the replication traverses the right generally over the waste, proof that the right does not extend to C. defeats the whole plea. *Morewood v. Wood*, 4 T. R. 157.; *Evans v. Ogilvie*, 2 Y. & J. 79. So in trespass for breaking plaintiff's several fishery in four places in a river; plea, that it was a public navigable river; replication, that plaintiff had a prescriptive right to dredge in the four places named in the declaration; rejoinder, traversing the prescription; the plaintiff is bound to shew a right in all four places, and not only where the trespass was committed. *Rogers v. Allen*, 1 Camp. 309.; and see *Maxwell v. Martin*, 6 Bing. 522. A prescriptive right of common in the defendant and his ancestors is not proved by shewing a grant 80 years ago to one of his ancestors. *Welcome v. Upton*, 5 M. & W. 398. But an ancient grant, without date, is not necessarily at variance with prescription; for it may be anterior to legal memory, or only confirmatory. *Addington v. Clode*, 2 W. Bl. 989.; and this is a question for the jury. *S. C.*

By the rules of H. T., 4 W. 4., it is provided that where, in an action of trespass *quare clausum fregit*, the defendant pleads a right of common pasture for divers kinds of cattle, *ex. gr.* horses, sheep, oxen, and cows, and issue is taken thereon, if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of common so found; and for the plaintiff, in respect of the trespasses which shall not be so justified. And in all actions in which such right of common as aforesaid, or other similar right, is so pleaded that the allegations as to the extent of the right are capable of being construed distributively, they shall be so taken. Notwithstanding these rules, where a right of folding cattle without limit is pleaded, and a right of common for cattle levant, &c. is proved, the court will not enter a verdict to the extent of the right proved. *Ivatt v. Mann*, 3 M. & G. 691.

See the recent act, 2 & 3 W. 4. c. 71., on the acquisition of rights of common, &c. by long user, cited fully, *antè*, p. 340.; and sect. 5., as to pleading such rights, *antè*, p. 496, 497. Under this act there may be a substantial enjoyment for thirty years, though the claimant did not use his common for a year or two, whilst he had no commonable cattle; and that is a question for the jury. *Carr v. Foster*, 3 Q. B. 581.

The cases mentioned under the previous head of evidence, on a plea of right of way, are for the most part applicable to other rights, except as to the period of time.

Evidence on plea of licence.] The licence, if denied, may be shewn to be an express one, or one implied from circumstances. The keeping open of a house in which there is a public billiard-table is a licence in fact to all persons to enter for the purpose of playing. *Ditcham v. Bond*, 3 Camp. 525. But there is no implied licence to enter a house and take goods sold by the plaintiff, the owner of the house, to the defendant, and left there by the plaintiff's consent. *Williams v.*

Morris, 8 M. & W. 488. The licensee in such a case must be express; and *semb.*, it is not irrevocable, unless it be by a deed sufficient to pass an interest in land. *S. C. ibid.* An acquiescence of the plaintiff in the trespass, upon an erroneous representation, to which the defendant was a party, of the legal obligation of the plaintiff to submit to it, will not support a plea of licence. *Semb. Roper v. Harper*, 4 New Ca. 20. It is not sufficient to shew a licence by a servant, unless it be in law the licence of the master; *Holdrinshaw v. Rag*, Cro. Eliz. 876.; or by a wife; *Taylor v. Fisher*, Cro. Eliz. 245.; or by a daughter; *Cock v. Wortham*, Selw. N. P. 1040.; unless the circumstances of the case shew that the wife or the daughter was the agent of the party for granting such licence. A licence includes, as incident to it, a power to do every thing without which the act licensed cannot be done. Thus if A. license B. to enter his house to sell goods, B. may take assistance, if necessary, for the purpose of selling the goods. *Dennett v. Grover*, Willes, 195. But an authority from a tenant to his landlord, in the absence of the former, to let the premises, will not justify the landlord in entering the premises (the key being lost) through a window by means of a ladder in order to shew the house. *Ancaster v. Milling*, 2 D. & R. 714.

If the plaintiff did in fact license the defendant, and the defendant has exceeded the licence, such excess cannot be given in evidence under a denial of the licence, but should be new assigned; *Ditcham v. Bond*, 3 Camp. 524.; 1 Saund. 300. d. (n.); but see *Symons v. Hearson*, 12 Price, 369. It has been held, however, that a revocation of the licence may be proved upon an issue joined upon this plea; for it shews that there was no licence at the time of the trespass. *Per Best C. J. and Holroyd J.*, in *Bridge v. Seddall*, Derby Sp. As. 1827, 2 Phill. Ev. 194., 7th ed.; but see Serjeant Williams's note, 1 Saund. 300. d. An abuse of an authority in law, whereby the defendant became a trespasser *ab initio*, must be replied. 1 Saund. 300. d. (n.)

Where the plaintiff means to deny the justification set up in the plea, he must take issue upon it, and not new assign. Thus, where the defendant pleads an entry to abate a nuisance, and the plaintiff new assigns unnecessary violence, he will not be allowed to negative the nuisance. *Pickering v. Rudd*, 1 Stark. 56.

Where the declaration states the trespasses to have been committed on divers days and times, and the defendant pleads that he committed the several trespasses by leave and licence, to which the plaintiff replies *de injuriâ* generally, the defendant must shew a licence co-extensive with the trespasses proved, i. e., a licence for each trespass proved by the plaintiff. *Barnes v. Hunt*, 11 East, 451. It has been said that this effect of the replication *de injuriâ* is peculiar to the plea of licence and results from the form in which it is usually pleaded; the plea may be framed so as to put the plaintiff to a new assignment. *Per Parke B.*, *Solly v. Neish*, 4 Dowl. P. C. 252.; *Littledale, J.*, in *Bowen v. Jenkin*, 6 A. & E. 919.; and *Parke B.*, in *Bolton v. Sherman*, 2 M. & W. 400.

Where A. applied to B. for leave to put a ladder on B.'s land "for the purpose of more conveniently finishing a window" opened in A's house, B., by permitting the ladder to be so placed, does not thereby impliedly license A. to open the window, especially if the situation and nature of the window is not pointed out to B. *Bridges v. Blanchard*, 1 A. & E. 536.

Evidence on a new assignment.] A new assignment waives and abandons the trespass which the defendant has justified. *Greene v. Jones*, 1 *Saund.* 299. c. (n). Therefore, where the defendant pleads *lib. ten.*, and the plaintiff new assigns, the defendant ought not to plead that the place mentioned in the new assignment is the same as that mentioned in the plea; but if in truth they are the same, the defendant should plead Not guilty, and the plaintiff will not be allowed to give evidence of any trespasses committed in the place mentioned in the plea. *Pratt v. Groome*, 15 *East*, 235.; *B. N. P.* 92. So where the defendant pleaded that the place where, &c. was part of a common which had been allotted to him, to which the plaintiff new assigned that the trespass complained of was in another place; upon its being stated in the opening of the plaintiff's counsel to the jury that the trespass was in the same place, but that the defendant had no title to it, it was held that the plaintiff could not recover. *Anon.* cited 16 *East*, 86. So if the defendant justifies under legal process, which is in fact irregular, and the plaintiff, instead of traversing the plea, new assigns that the trespass complained of was on another and different occasion, such new assignment admits the justification stated in the plea, and if the plaintiff can only prove one trespass, that trespass will be covered by the plea, and the defendant will be entitled to a verdict. *Oakley v. Davis*, 16 *East*, 82.; and see *Atkinson v. Matleson*, 2 *T. R.* 172., *antè*, p. 472-3. When the trespass, proved clearly, differs in its circumstances from the one justified, the plaintiff is not bound to prove two separate trespasses; but if alike, the jury should presume them to be the same. *Darby v. Smith*, 2 *M. & Rob.* 184.

On the other hand, if there were in fact two trespasses, but only one count, and the defendant has pleaded a justification which he can prove as to one, the plaintiff must new assign if he means to rely on the other trespass. See *antè*, p. 472.

In some cases, as already stated, *antè*, p. 493-4., the plaintiff may both reply and new assign, and will, if he succeeds, be entitled to recover for the trespasses attempted to be justified in the plea, as well as for those covered by the new assignment.

In trespass, *q. c. f.* and making a railroad on the close, the defendant pleaded a grant of sufficient way leave, &c. to dig for coal, and that the railroad was convenient, proper, and necessary; to which the plaintiff new assigned trespasses for different purposes, and to a greater extent than necessary: Held, that the necessity of some sort of railroad was admitted on this record by the plaintiff, but that he might shew it to be constructed in a direction and manner not warranted by the grant. *Dand v. Kingscote*, 6 *M. & W.* 174. It is a question for a jury in such case whether a railway is necessary or expedient for the purpose of effectually working reserved mines. *Durham and Sunderland Railway Co. v. Walker*, 2 *Q. B.* 940.

Where the defendant justifies and the plaintiff relies upon an act which renders the defendant a trespasser *ab initio*, such act should be replied; for should the plaintiff new assign that the trespass is a different trespass, he cannot recover; since he can only prove one continued act of trespass, the justification of which is admitted by the new assignment. *Aitkenhead v. Blades*, 5 *Taunt.* 198. Nor can the plaintiff in such case recover under a replication of *de injuriâ* generally. *Lambert v. Hodgson*, 1 *Bing.* 317

Where the defendant lets judgment go by default on the new assignment, but leaves the plea of Not guilty to the declaration on the record without withdrawing it as to the matters newly assigned, the plaintiff must prove the trespasses newly assigned; *Broadbent v. Shaw*, 2 B. & Ad. 940.; for they were in fact included in the declaration, and are therefore still denied by the plea.

Competency of Witnesses.

In trespass by A. against his next neighbour B. touching the right to a lane dividing their properties, their common landlord is an admissible witness to shew that he let it to them as tenants in common; *Noye v. Reed*, 1 M. & R. 63. Where the question was whether the plaintiff, or one T. W. under whom defendant claimed, was entitled to the close, T. W. was held competent for the defendant; for the result cannot change the possession as in ejectment. *Rees v. Wallers*, 3 M. & W. 527. The cases of incompetency will now be much narrowed by the operation of 6 & 7 Vict. c. 85. See Appendix.

TRESPASS FOR MESNE PROFITS.

In an action of trespass for mesne profits, (which may be brought in the name of the lessor of the plaintiff in ejectment, or in the name of the nominal plaintiff,) the plaintiff may by the pleadings be called upon to prove, 1. his title; 2. his re-entry; 3. the defendant's liability by reason of possession; and, 4. the amount of damages.

Evidence of title.] The judgment in ejectment is proof of title for the plaintiff in this action, whether it be brought by the lessor of the plaintiff or by the nominal plaintiff, against all who are parties or privies to such judgment, and whether the judgment in ejectment be upon verdict or by default; *Aslin v. Parkin*, 2 Burr. 665.; *Doe v. Whitcomb*, 8 Bing. 46.; but it is only evidence of title from the time of the demise laid in the declaration in ejectment, and therefore if the plaintiff seeks to recover mesne profits anterior to that time, it will be necessary for him to give further evidence of his title; *B. N. P.* 87.; *Aslin v. Parkin*, 2 Burr. 668.; and it is, in no case, *conclusive* evidence on an issue joined on the title to the close. *Doe v. Huddart*, 2 C. M. & R. 316. To be conclusive it must be replied. *Doe v. Wright*, 10 A. & E. 763. A judgment in ejectment on the several demises of two or more persons will be evidence of title for them in a joint action of trespass brought by them; for they may be tenants in common. *Chamier v. Clingo*, 5 M. & S. 64. The judgment will not be evidence against a stranger; and therefore a judgment in ejectment against a wife cannot be given in evidence against her husband; *Denn v. White*, 7 T. R. 112.; but it is evidence against a person who comes into possession, after the judgment, under the defendant in ejectment; *Doe v. Whitcomb*, 8 Bing.

46.; though not against a person merely shown to be in possession, without further proof of privity to the judgment; *Doe v. Harvey*, *ib.* 239.; and it cannot be shewn by parol that the defendant came in under the defendant in the former action, where it appears he came in under a written agreement. *S. C. ib.* Where, after judgment by default against the casual ejector, an action, for the mesne profits was brought against the landlord who had been in the receipt of the rents and profits from the day of the demise, Lord Ellenborough ruled that the judgment in ejectment was not evidence against him without notice of the ejectment; but that a subsequent promise by him to pay the rent and costs amounted to an admission that he was a trespasser, and that the plaintiff was entitled to the possession. *Hunter v. Britts*, 3 *Camp.* 455.

Evidence of plaintiff's re-entry.] As trespass only lies at the suit of one in possession, the plaintiff must appear to have been in possession when the defendant first entered and expelled him. Where the action is brought against a person who was party to the ejectment and entered into the consent rule, proof of the judgment in ejectment is sufficient without proving the writ of possession executed; because, by entering into the rule, the defendant is estopped both as to the lessor and lessee, so that either may maintain trespass without proving an actual entry. *B. N. P.* 87. But where the judgment is against the casual ejector, and no rule therefore has been entered into, it is said that the lessor cannot maintain trespass without an actual entry, and therefore ought to prove the writ of possession executed, *id. ib.* This is done by producing an examined copy of the writ and of the sheriff's return. The plaintiff may also prove a re-entry by shewing that he was let into possession with the consent of the defendant. *Calvert v. Horsfall*, 4 *Exp.* 167. It is, however, doubted whether in either case an actual re-entry need be proved, inasmuch as the judgment in ejectment is equally evidence of possession and of title. *Aslin v. Parkin*, 2 *Burr.* 668.; *Runnington Eject.* 442. And it is the better opinion, though not absolutely decided, that the entry, whether real or confessed, has relation to the first accruer of the title, so as to entitle the plaintiff to mesne profits from that time. 2 *Stark. Evid.* 312.; *B. N. P.* 87.

The defendant's possession.] The possession, and length of time since the defendant has been in such possession, seem proper evidence on the issue on Not guilty; and the dates alleged in the declaration of trespass, as that of the ejectment and of the recovering possession, are not material though not under *videlicet*. The duration of possession must therefore be proved, even where defendant lets judgment go by default. *Ive v. Scott*, 9 *Dowl. P. C.* 993. The action has been said to be only against the person who is actually in possession and trespassing; therefore it does not lie against a lessee whose undertenant holds over after the expiration of the lessee's interest. *Burne v. Richardson*, 4 *Taunt.* 720. But this doctrine cannot be supported; therefore, where the defendant in ejectment, K., had previously demised to A., who underlet to B., and B. wrongfully held over, paying rent to A., who accepted it under his title from K., it was held that all three might be joined in trespass for the mesne profits; but *semb.*, it would have been different if the under-tenant had held over against the will of his imme-

diate lessor. *Doe v. Harlow*, 12 A. & E. 40. And in such a case as the above, the record in ejectment against K. is evidence against A. and B. *S. C. ib.* The defendant cannot defeat the action by shewing that he entered only as agent for, and under licence of, the defendant in ejectment. *Girdlestone v. Porter*, Woodf. L. & T. 511.

The judgment in ejectment is no evidence of the time during which the defendant has been in possession; the consent rule admits possession by the defendant at the time of the service of the declaration; but if the plaintiff seeks damages for an earlier period, he must give further evidence of the possession. *Dodwell v. Gibbs*, 2 C. & P. 615; *Askin v. Parkin*, 2 Burr. 668.

The damages.] The plaintiff must be prepared to prove the value of the mesne profits, and he may recover not only the actual mesne profits, but also damages for his trouble, &c. *Goodtitle v. Tombs*, 3 Wils. 121. So he may recover the amount of the taxed costs of the ejectment (if laid in the declaration), but not any extra costs; *Doe v. Davis*, 1 Esp. 358.; *Brooke v. Bridges*, 7 B. Mo. 471.; unless there was judgment by default in the ejectment. *Doe v. Huddart*, 2 C. M. & R. 316. See *Doe v. Filliter*, 11 M. & W. 80. He may likewise recover, by way of damages, costs incurred by him in a court of error in reversing a judgment in ejectment obtained by the defendant. *Nowell v. Roake*, 7 B. & C. 404. The measure of damages is not the whole mesne profits, but only such profits as accrued during the possession of the defendant. *Girdlestone v. Porter*, Woodf. L. & T. 511.

Defence.

If the plaintiff seeks to recover the mesne profits for more than six years, the defendant may plead the statute of limitations. *B. N. P.* 89. Under the general issue the defendant cannot give in evidence that the plaintiff accepted the rent of the premises for the time in dispute, and agreed to waive the costs of the ejectment; for this admits a trespass. *Doe v. Lee*, 4 Taunt. 459. Where he is not concluded by the record in ejectment, the defendant may controvert the plaintiff's title. *Doe v. Huddart*, *suprà*.

Recovery of the mesne profits in ejectment.] By stat. 1 Geo. 4. c. 87. s. 2., whenever it shall appear on the trial of an ejectment at the suit of a landlord against a tenant, that the tenant or his attorney has been served with due notice of trial, the plaintiff shall not be non-suited for default of the defendant's appearance, or of confession of lease, entry, and ouster, but the production of the consent rule and undertaking of the defendant shall in all such cases be sufficient evidence of lease, entry, and ouster, and the judge before whom the cause is tried shall permit the plaintiff (whether the defendant shall appear upon such trial or not), after proof of his right to recover possession of the whole or of any part of the premises mentioned in the declaration, to go into evidence of the mesne profits from the day of the expiration or determination of the tenant's interest down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein; and the jury on the trial finding for the plaintiff, shall in such

case give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also the amount of the damages to be found for the mesne profits; provided that this shall not be construed to bar any landlord from bringing an action of trespass for the mesne profits which shall accrue from the verdict, or the day therein specified, down to the day of the delivery of possession of the premises recovered in the ejectment.

Under 1 Geo. 4. c. 87., a landlord may recover for mesne profits to the day of trial, though no notice of trial is proved. *Doe v. Hodgson*, 12 A. & E. 135.

TROVER.

The evidence in an action of trover will depend upon the issue joined. The facts which constitute a complete title for the plaintiff in this action, and which must be proved if denied by the pleadings, are, 1. a general or special property in the goods, or, as against a wrong-doer, a possession of them; 2. an actual or constructive possession or right of possession; and, 3. a conversion by the defendant. In addition to this the plaintiff must prove, 4. the value or damage.

Evidence of general property in the goods.] The plea of no property in the plaintiff means no property as against the defendant. *Nicolls v. Bastard*, 2 C. M. & R. 659. When the property in the goods is put in issue, the evidence for the plaintiff will depend upon the nature of his particular title. Where there is both a general and a special owner, but the general owner has not transferred his right to the possession, he may still maintain this action; thus, where he has delivered the goods to a carrier or other bailee and so parted with the actual possession, he may still maintain trover for a conversion by a stranger; for the owner retains the possession in law, as against a wrong-doer, and the carrier or other bailee is only his servant. *Gordon v. Harper*, 7 T. R. 12.; 2 Saund. 47. b. (n.); *Nicolls v. Bastard*, 2 C. M. & R. 659. And if the bailee of goods for a special purpose transfers them to another in contravention of that purpose, the general owner may maintain trover against that person, though he be a *bonâ fide* vendee, unless the goods have been sold in market overt. *Wilkinson v. King*, 2 Camp. 335.; *Loeschman v. Machin*, 2 Stark. 311.; but see 2 Saund. 47. b. (n.)

This action only lies for goods, and cannot be maintained for fixtures attached to the freehold. *Minshall v. Lloyd*, 2 M. & W. 450.

Evidence of general property — vesting of the property.] With regard to the time at which the property passes on the sale of goods, it has been laid down, that where goods are sold, and nothing is said as to the time of delivery or the time of payment, and every thing the

seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods; *Tarking v. Baxter*, 6 B. & C. 360.; and the seller is liable to deliver them, whenever demanded, upon payment of the price; but the buyer has no right to have possession of the goods till he pays the price. If the goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute; it is liable to be defeated if he becomes insolvent before he obtains possession. *Per Bayley J.*, in *Bloxam v. Sanders*, 4 B. & C. 948. Where goods in bulk are sold at so much a ton, the property in them does not pass by the sale before they are weighed; *Simmons v. Swift*, 5 B. & C. 857.; and if the contract be within the Statute of Frauds, and there is no note or memorandum, acceptance, or earnest, the contract is by that statute not good, and no property passes. *Bloxsome v. Williams*, 3 B. & C. 234; and see *ante*, p. 263. 278. The property in goods passes on a sale by auction, though they are not to be delivered till certain duties are paid by the seller. *Hinde v. Whitehouse*, 7 East, 558.; and see *Phillimore v. Barry*, 1 Camp. 513.; *Noy's Maxims*, 88. Where a quantity of iron was to be delivered under a contract that certain bills outstanding against the seller should be taken out of circulation, and after a part of the iron had been delivered, no bills had been taken out of circulation, the seller brought trover for the part delivered; it was held that, it being only a conditional delivery and the condition being broken, the action might be maintained; and, *per Bayley J.*, if a tradesman sell goods to be paid for on delivery, and his servant, by mistake, deliver them without receiving the money, he may, after demand and refusal to deliver or pay, bring trover for his goods against the purchaser. *Bishop v. Shillito*, 2 B. & A. 329. (n.); *Brandt v. Bowlby*, 2 B. & Ad. 932. So the property which passes by the sale may be divested by rescinding the contract. Thus where A. sold goods to B. and afterwards, and before the delivery to B., C. became possessed of the goods, and on being informed of the circumstances, declared that he would not deliver them to any person whatever, it was held that A., having repaid B., might maintain trover against C.; the contract between A. and B. being rescinded, and A. being remitted to his former right. *Pattison v. Robinson*, 5 M. & S. 105. Where A. is indebted to C., and B. to A., it is agreed between them that B. shall deliver goods to C. in satisfaction of A.'s debt, and B. converts them to his own use, C. may maintain trover for the goods, though he never had possession; for by agreement the right is in him. *B. N. P.* 35.

Where A. agrees to build a ship for B., and it is part of the terms of the contract that given portions of the price shall be paid according to the progress of the work, the payment of those instalments appropriates specifically to B. the very ship in progress, and vests in him a property in that ship. *Woods v. Russell*, 5 B. & A. 942. A ship-builder contracted with P. to build him a ship for a certain sum to be paid by instalments as the work proceeded; the first instalment when the vessel was rammed, the second when she was timbered, &c. An agent for P. was to superintend the building. The vessel was built under such superintendence, all the materials being approved by the agent before they were used. The builder became bankrupt before the

ship was completed, afterwards the assignees completed the ship. All the instalments were paid or tendered. In an action of trover by P. against the assignees for the ship, the court held that, on the first instalment being paid, the property in the portion then finished became, by virtue of the contract, vested in P., subject to the right of the builder to retain such portion for the purpose of completing the work and earning the rest of the price; and that each material subsequently added became, as it was added, the property of P. as the general owner. They also held, that, under the above circumstances, the ship did not pass to the assignees as having been in the possession, order, or disposition of the bankrupt by consent of the true owner, within stat. 6 Geo. 4. c. 16. s. 72. *Clarke v. Spence*, 4 A. & E. 448. See also *Goss v. Quinton*, 3 M & G. 825. But where goods are ordered to be made, so long as the order is not executed but only in a course of execution, no property in general passes to the person for whom they are to be made. *Bishop v. Crawshaw*, 3 B. & C. 419.; *Mucklow v. Mangles*, 1 Taunt. 318.; see *Carruthers v. Payne*, 5 Bing. 270.; *Atkinson v. Bell*, 8 B. & C. 283.

By a gift of goods the property does not pass, unless the gift be by deed or instrument of gift, or be executed by an actual delivery of the thing given to the donee. *Irons v. Smallpiece*, 2 B. & A. 551. But if A. in London gives J. S. his goods at York, and another takes them away before J. S. obtains actual possession, J. S. may, it is said, maintain trover or trespass for them. *Br. Ab. Trespass*, 303.; *Hudson v. Hudson*, *Latch*. 214.; 2 *Saund.* 47, a (n.).

By a fraudulent or illegal sale or transfer of goods no property passes; as where a wharfinger, without leave of the owner, sells goods in his possession. *Wilkinson v. King*, 2 Camp. 335. So a sale of live pheasants passed no property while the 58 Geo. 3. c. 75. prohibiting the sale was in force. *Helps v. Glenister*, 8 B. & C. 553. So where a person obtains goods upon false pretences under colour of a purchase, the property is not changed. *Noble v. Adams*, 7 Taunt. 59.; *Kilby v. Wilson*, R. & M. 178.; *Irving v. Motly*, 7 Bing. 543. So where stolen goods are pawned; *Packer v. Gilkes*, 2 Camp. 336. (n.); *Wilkin's case*, 1 *Leach*, 522. And by stat. 1 Jac. 1. c. 21. s. 5. the sale of any goods wrongfully taken to any pawnbroker in London, or within two miles thereof, shall not alter the property. But if stolen goods are sold in market overt, the property is divested out of the owner. Thus, where stolen goods were purchased in market overt, and sold by the purchaser before the felon was convicted, it was held that the owner of the goods, prosecuting to conviction, could not maintain trover against him under the statute 21 H. 8. c. 11: (which gives restitution to the owner who prosecutes the felon to conviction), although he gave the purchaser notice of the robbery while the goods were in his possession; for the property, being altered by the sale in market overt, was not re-vested in the owner till the conviction of the felon; but the defendant had parted with the possession before that time, and therefore could not be said to have converted the plaintiff's goods. *Horwood v. Smith*, 2 T. R. 750.; and see *Parker v. Patrick*, 5 T. R. 175. However, in a very late case it was held that where a person purchases stolen goods not in market overt, and sells them, after notice of their having been stolen, in market overt, the owner, having prosecuted the thief to conviction, may maintain trover against such person. *Peer v. Humphrey*, 2 A. & E. 405. In

trover for stolen property it does not seem to be necessary for the plaintiff to show the mode by which it passed out of his hands. *Down v. Halling*, 4 B. & C. 334.

By a writ of execution the property in the goods is not altered until execution executed. *Lucas v. Nockells*, 10 Bing. 182. Even the actual seizure does not alter the property; for if sold unnecessarily, or after a tender, trover lies by the debtor against the sheriff. See Little-dale, J., in *Giles v. Grover*, 9 Bing. 239.; Patteson, J., in *Woodland v. Fuller*, 11 A. & E. 867. But as between subject and subject the property is bound by the delivery of the writ to the sheriff. 29 Car. 2. c. 3. The meaning of the words, that the goods shall be "bound by the delivery of the writ to the sheriff" is, that, after the writ is so delivered, if the defendant makes an assignment of the goods, unless in market overt, the sheriff may take them in execution. Per Lord Hardwicke, C. J., *Louthal v. Tomkins*, B. N. P. 91.; and see *R. v. Wells*, 16 East, 278. The "binding," both in the case of the king and of a common person, relates only to the debtor himself and his acts, so as to vacate any intermediate assignment made by him otherwise than in market overt. Per Patteson, J., in *Giles v. Grover*, 9 Bing. 136. Lord Ellenborough lays down the rule thus, "the goods are bound by the delivery of the writ to the sheriff as against the party himself, and all claiming by assignment from, or representation through or under, him." *Payne v. Drew*, 4 East, 523. And in *Samuel v. Duke*, 3 M. & W. 622., it was held that, although the goods of a debtor are bound by the delivery of a writ of execution to the sheriff, the property in them is not changed by it, but is still in the debtor, and he may sell them, subject to the rights of the execution creditor, to which they will be liable in the hands of a purchaser unless the sale took place in a market overt.

By a judgment for damages in trover, and satisfaction of the damages, the property in the goods taken is vested in the defendant; *Adams v. Broughton*, 2 Stra. 1078.; *Morris v. Robinson*, 3 B. & C. 206.; i. e. where the full value of the article has been recovered; for otherwise the judgment will not bar even other actions of trover. Per Holroyd, J., *ibid.* So judgment for the plaintiff in replevin in the *detinet* for damages, vests the property of the goods in the defendant. *Moore v. Watts*, 1 Ld. Raym. 614. See *Holmes v. Wilson*, 10 A. & E. 503. 511 (n).

An executor or administrator has the property of the goods of the testator or intestate vested in him before actual possession; *Com. Dig. Administration* (B. 10.); and though administration be not granted for a long time, yet, when it is granted, it vests the property in the administrator, by relation, from the time of the death of the intestate. *Ibid.* 2 Rol. Ab. 554. l. 15. 25.; *R. v. Horsley*, 8 East, 410.; and see the cases cited *anté*, p. 443.

If a man takes the goods of another by wrong, the property is not altered. *Com. Dig. Biens* (E). Nor will the property in goods pass by an award. *Hunter v. Rice*, 15 East, 100.

Evidence of property—negotiable securities.] Questions have frequently arisen as to the passing of property in bank notes, promissory notes, and other securities for money. The general rule is, that bank notes or bills, drafts on bankers, bills of exchange, or promissory notes, either payable to order or indorsed in blank, or payable to bearer, when taken *bonâ fide* and for a valuable consideration, pass by delivery, and vest a

right thereto in the transferee without regard to the title or want of title in the person transferring them. *Per* Holroyd, J., *Wootkey v. Pole*, 4 B. & A. 9., citing *Muller v. Race*, 1 Burr. 452.; *Grant v. Vaughan*, 3 Burr. 1516.; *Peacock v. Rhodes*, 2 Doug. 636. So exchequer bills; *Wootkey v. Pole*, 4 B. & A. 1.; and Prussian bonds; *Gorgier v. Mievill*, 3 B. & C. 45. It was formerly considered a question of fact for the jury, under all the circumstances of the case, whether the bill had been taken *bona fide* or not, and whether due and reasonable caution had been used by the person taking it. *Gill v. Cabitt*, 3 B. & C. 477. And the decisions put the title to the bill, &c., not on the *bona* or *mala fides*, but on the degree of caution with which it had been received. *Easley v. Crookford*, 10 Bing. 245. These authorities, however, have been since reconsidered and overruled, and it is now settled that the question is, whether the party taking the bill acted with good faith. The question, whether or not he was guilty of gross negligence, is improper. Gross negligence may indeed be evidence of *mala fides*, but is not equivalent to it. *Goodman v. Harvey*, 4 A. & E. 870.; *Uther v. Rich*, 10 A. & E. 784.

Trover lies for a lost bank note which the defendant has converted, though part of the proceeds have been paid by him to the plaintiff; nor does the acceptance of such part waive the tort. *Burn v. Morris*, 4 Tyrwh. 485.; S. C. 2 C. & M. 579.

Evidence of special property.] It is sufficient for the plaintiff to prove that he has a special property in the goods converted. Thus a bailee; *Nicolls v. Bastard*, 2 C. M. & R. 659.; the sheriff who has taken goods in execution; *B. N. P.* 33.; the agister of cattle; *Br. Ab. Tresp.* 67.; the lord who seizes an estray or wreck before the year and day expired; *B. N. P.* 33.; may all maintain this action. So if a house be blown down, and a stranger takes away the timber, the lessee for life may bring trover; for he has a special property to make use of the same in rebuilding. *Ibid.* But where a lord, entitled to five heriots, marked seven and afterwards demanded them, trover will not lie upon such general demand and refusal; for the lord ought to demand only the five chosen by him. *Abington v. Lipscomb*, 1 Q. B. 776. In some cases a person who has only a special property may maintain trover, although he has never had actual possession; thus a factor to whom goods have been consigned, but by whom they have never been received, may bring trover for them. *Per* Eyre, C. J., *Fowler v. Down*, 1 B. & P. 47. The consignee of goods as a mere security to meet bills accepted by him for the consignor, may bring trover, although no bill of lading has been executed. *Evans v. Nichol*, 3 M. & G. 614. And where the consignor of goods, hearing that the consignee had stopped payment, indorsed the bill of lading to the plaintiff without consideration, directing him to take possession of the goods, and the plaintiff demanded the goods from the defendants (wharfingers), who refused to deliver them, it was held that the plaintiff had such a special property as entitled him to maintain trover. *Morrison v. Gray*, 2 Bing. 260.; *Waring v. Cor*, 1 Camp. 369.; *Sargent v. Morris*, 3 B. & A. 277. Special property may be sufficient to support an action even against the owner of the goods; thus where a person, entitled to the temporary possession of a chattel, delivers it to the general owner for a special purpose, he may, after that purpose is satisfied and on the refusal of the general owner to return it, maintain trover against him for the chattel. *Roberts v. Wyatt*, 2 Taunt. 268. It

was indeed been held that a landlord, who distrains and impounds goods, has not such a special property as will enable him to maintain trover; for he has only a pledge, with a power to sell by statute; *Monneaux v. Goreham*, Selw. N. P. 1303.; and the goods when impounded are not in the possession of the landlord, but in the custody of the law between the parties. *R. v. Cotton, Parker*, 121.

Evidence of property — what sufficient against a wrong-doer.] Where the action is brought against a mere wrong-doer, it will be sufficient for the plaintiff to show that he was in possession of the property. Thus where a chimney-sweeper's boy found a jewel, and took it to a jeweller who refused to return it, it was held, that, though the finder did not acquire an absolute property, yet he had such a property as would enable him to keep it against all but the rightful owner, and consequently that he might maintain trover. *Armory v. Delamirie*, 1 Stra. 505. So where the plaintiff bought a stranded vessel, which was not conveyed to him according to the provisions of the registry acts, and took possession of her, and she afterwards went to pieces, and part of the wreck, drifting upon the defendant's premises, was seized by him, it was held that plaintiff had a sufficient property to maintain this action. *Sutton v. Buck*, 2 Taunt. 302. So where the owner of furniture lent it to the plaintiff under a written agreement, and the plaintiff placed it in a house occupied by the wife of C., a bankrupt, it was held that the plaintiff might recover in trover against C's assignees without producing the agreement. *Burton v. Hughes*, 2 Bing. 173. In trover for copper ore it was proved that the plaintiff was in possession of land in which he sunk a shaft and raised the ore in question. Held that this was *prima facie* evidence of the plaintiff's right to the ore, although the same witness, on cross-examination, proved that the ore was taken by a person who had a shaft in an adjoining close, and was getting the same load of copper ore under the plaintiff's land where he had sunk his shaft. *Rowe v. Brenton*, 8 B. & C. 737. And it is enough to show occupation without proving the title of the lessors under whom the plaintiff claims; nor is it any answer that some of the lessors named in the lease have not executed it; for this, if material at all, is only evidence in reduction of damages. *Taylor v. Parry*, 1 M. & G. 604.

The owner of a ship, when the cargo is put on board, is *prima facie* owner of the cargo, so as to sue a wrong doer in trover. *Brancker v. Molyneux*, 3 M. & G. 84.

Evidence of right of possession.] The plaintiff must show that he has a right to the immediate possession of the goods, or he cannot recover in this action. Thus the purchaser of goods not sold upon credit, though by the contract of sale he acquires the right of property, has no right of possession until he pays or tenders that price. *Blaxam v. Sanders*, 4 B. & C. 941. A quantity of hops was purchased from the defendants in April, 1831, the invoice of which contained the words "on rent." The hops remained in the sellers' warehouse, and an acceptance of the buyer was afterwards given them at their request, which they indorsed on getting it discounted. During the running of that bill, part of the hops was delivered, in pursuance of the buyer's order, to his sub-purchaser, who paid the warehouse rent charged by the sellers. Afterwards, and before the bill became due, the original buyer became

bankrupt, and it was dishonoured at maturity. Held that the assignee of the original buyer could not maintain trover for them without actual payment of the price agreed on; he having only the right of property, without that of possession. *Miles v. Gorton*, 4 Tyrwh. 295; *S. C.* 2 C. & M. 504. The vendor, having a lien for the price, permitted the vendee to have a key of the part of the vendor's premises on which the goods were to remain till payment, the vendor retaining a general control over the premises as before. Held, that this was not such a possession by the vendee as to support trover against the vendor for a wrongful removal of the goods. *Milgate v. Keble*, 3 M. & G. 100. A lessor cannot bring trover against the lessee for an indenture of lease containing covenants by the lessor, although the term is expired. *Hall v. Ball*, 3 M. & G. 242; and it is doubtful whether he could do so even if it contained no such covenants. Where goods, leased as furniture with a house, have been wrongfully taken in execution by the sheriff, the landlord cannot maintain trover against the sheriff pending the lease; for he has not the right of possession. *Gordon v. Harper*, 7 T. R. 9.; *Pain v. Whittaker*, R. & M. 99. But where the furniture was let to a married woman living apart from her husband, it was held, that inasmuch as she could not acquire the right of possession by any contract, the owner of the furniture might maintain trover for it. *Smith v. Plomer*, 15 East, 607. And where certain mill machinery, together with a mill, had been demised for a term to a tenant, who, without permission from his landlord, severed the machinery from the mill, and it was afterwards seized and sold by the sheriff under a *fi. fa.*, it was held that no property passed to the vendee, and that the landlord was entitled to bring trover for the machinery even during the continuance of the term. *Farrant v. Thompson*, 5 B. & A. 826. So where lands are leased for years, and a tree is cut down by a stranger during the term, the landlord may maintain trover for it; for when it is severed the special property of the lessee is determined. *Berry v. Heard*, Cro. Car. 242., Croke, J. *dissentiente*. But trover cannot be maintain by a tenant in tail expectant on the determination of an estate for life, without impeachment of waste, for timber which grew upon and was severed from the estate; for the tenant for life has a right to the trees the moment they are cut down. *Pyne v. Dor*, 1 T. R. 55.; *Williams v. Williams*, 12 East, 209.; *Channon v. Patch*, 5 B. & C. 897. Where a father gave to his son, an infant aged sixteen, a watch, and certain books and wearing apparel, it was ruled that the right of possession was in the son, and that the father could not maintain trover for them; though perhaps it might have been otherwise in the case of child of tender age. *Hunter v. Westbrook*, 2 C. & P. 578.

A tenant is entitled, at the expiration of his term, to remove a wooden barn which he had erected on foundations of wood and stone; the foundation being let into the ground, but the barn resting on it by weight alone. He may maintain trover for it; and if the reversioner who has refused, whilst off the premises, to allow the tenant to remove it, afterwards, whilst a third party is in possession, comes on the land and prevents the tenant from removing it, this is a conversion by the reversioner. *Wainsborough v. Maton*, 4 A. & E. 884. An outgoing tenant may remove an ornamental chimney-piece put up by himself during his tenancy; but not pillars of brick and mortar built on a dairy floor to hold pans, although such pillars are not let into the ground. *Leach v. Thomas*, 7 C. & P. 327.

Evidence of conversion — direct conversion.] The gist of the action of trover is the wrongful conversion of the plaintiff's goods by the defendant; a conversion, however, does not, *ex vi termini*, imply a transfer of property to the defendant, but rather a deprivation of property to the plaintiff. *Keyworth v. Hill*, 3 B. & A. 687. A conversion may be proved either by evidence of a direct act of conversion, or by showing a demand of the goods by the plaintiff and a refusal by the defendant to deliver them. An unlawful taking of goods out of the possession of the owner is itself a conversion, and not mere evidence of it; *B. N. P.* 44., 2 *Saund.* 47 g (n); provided the taking or detention be with intent to convert them to the use of the taker, or of some other person, or have the effect of destroying or altering their quality or nature. For if there be a trespass committed which does not interfere with the owner's general dominion over the property, this is no conversion. Therefore, where a ferryman, refusing to take a passenger's horses, removed them from the boat and put them ashore, this was held not to be in itself a conversion; but where the ferryman sent the horses to the house of a person who refused to redeliver them to the owner unless he paid for the keep, and afterwards sold them to pay the expenses, this was held evidence of a conversion. *Fouldes v. Willoughby*, 8 M. & W. 540. A bankrupt may maintain trover against his assignees in order to try the validity of the commission, without proving a demand and refusal; for the taking of the goods by the assignees is a sufficient conversion, and the plaintiff must be deemed to have delivered them on compulsion. *Summersett v. Jarvis*, 3 B. & B. 2. So the using a thing without the licence of the owner is a conversion. *Mulgrave v. Ogden*, Cro. Eliz. 219; *Keyworth v. Hill*, 3 B. & A. 687. Thus the wearing of a pearl is a conversion. *Lord Peter v. Heneage*, 12 Mod. 519. So where a person finds a thing and misuses it, it is a conversion. *Mulgrave v. Ogden*, *supra*. And where a person, coming to the possession of land, found there a block of stone belonging to another, and removed it not to an adjacent place, but to a distance, it was ruled to be a conversion. *Fordsdick v. Collins*, 1 Stark. 173; see *Houghton v. Butler*, 4 T. R. 364. So drawing part of the wine out of a vessel, and filling it up with water, is a conversion of all the liquor. *Richardson v. Atkinson*, 1 Stra. 576. But it has been said in a recent case by Pateson and Coleridge, JJ., that the conversion of part is not the conversion of the whole, if the remainder continues in a fit state to be delivered up, and the party offers to deliver it up. *Philpott v. Kelley*, 3 A. & E. 106. The mere fact of a bailee bottling a cask of wine is not evidence of a conversion. *S. C. Ibid.*

A person in the lawful possession of goods may be guilty of a conversion of them by dealing with them contrary to the orders of the owner. Thus where the owner of goods on board a vessel directed the captain not to land them on a wharf against which the vessel was moored, which he promised to do, but afterwards delivered them to the wharfinger for the owner's use under an idea that the wharfinger had a lien thereon for the wharfage fees, this was held a conversion. *Syeds v. Hay*, 4 T. R. 260. But where the defendant, who had been entrusted by the plaintiff to sell certain goods in India, not being able to sell them there himself, delivered them to an agent in India to be disposed of by him, it was held no conversion. *Bromley v. Corwell*, 2 B. & P. 438.

In order to constitute an actual conversion, it is not necessary that the party should deal with the deeds as his own; thus where a bankrupt, being indebted to G., delivered goods to G.'s servant, who gave a receipt for them in G.'s name and sold them for his use, it was held that this sale was a conversion by the servant. *Perkins v. Smith*, 1 Wils. 328. So the mis-delivery of goods by a warfanger; *Devereux v. Barclay*, 2 B. & A. 702.; or by a carrier; *Youl v. Harbottle, Peake*, 49.; *Stephenson v. Hart*, 4 Bing. 483.; is a conversion; though it is otherwise where he loses them by accident. *Ibid.*; *Ross v. Johnson*, 5 Burr. 2825.; *Kirkman v. Hargreaves*, 1 Selw. N. P. 425. Proof that the carrier asserted he had delivered the goods to the consignee, and that such assertion is false, is not alone evidence of a conversion. *Atterton v. Briant*, 1 Camp. 409.

Taking the plaintiff's property by assignment from another, who has no right to dispose of it, is a conversion. Therefore where the defendant took an assignment of tobacco in the king's warehouse by way of pledge from a broker who had purchased it in his own name for his principal, it was held that he had been guilty of a conversion; it being also proved, that, when the tobacco was demanded from him by the plaintiff, he refused to deliver it. *M'Combie v. Davies*, 6 East, 536.; *Baldwin v. Cole*, 6 Mod. 212.; see also *Jackson v. Anderson*, 4 Taunt. 25. But where goods were placed in the hands of a factor for sale, and he indorsed the bills of lading to the defendants, who thereupon accepted a bill for him, and he at the same directed the defendants to sell the goods, and reimburse themselves the amount of the bill out of the proceeds, it was held that the defendants, having sold the goods, could not be sued for them in trover by the original owner. *Stierneid v. Holden*, 4 B. & C. 5. And where the defendant was entrusted by the plaintiff with a bill of exchange to get it discounted, and afterwards misapplied the proceeds, it was held that trover would not lie against him. *Palmer v. Jarman*, 2 M. & W. 282. So where a broker, who is authorised to sell goods at a certain price, sells them at an inferior price, it is no conversion. *Dufresne v. Hulchinson*, 3 Taunt. 117.

A wrongful sale of goods is a conversion, and no demand is necessary. *Edwards v. Hooper*, 11 M. & W. 363. Where A. consigned the goods of B. to the defendant, who, without notice of the right of B., sold a part, and kept the remainder in his possession, the sale was held to be a conversion. *Featherstonhaugh v. Johnston*, 8 Taunt. 237. A banker discounted a bill drawn on a customer and accepted payable at his bank, after notice that it had been lost by the holder: he afterwards debited his customer with the amount of the bill, wrote a discharge on it, and delivered it up to the customer as the voucher of his account; held that the banker was guilty of an actual conversion, and that a demand was unnecessary. *Lovell v. Martin*, 4 Taunt. 799. If the holder of a bill for a specific purpose gets money on it by discount without authority, this is a conversion of the whole, though he may have received only part of the money due on it, and the jury may give the whole amount as damages. *Alsager v. Close*, 10 M. & W. 576. So where the drawer of a bill deposited it with a creditor, giving him authority to receive the proceeds and apply them in a specific way; and the creditor, after the drawer had committed an act of bankruptcy, gave up the bill to the acceptor, and took another instead, this was held to

be a conversion by him as against the assignees. *Robson v. Rolls*, 1 M. & Rob. 239.

Where the defendant took the plaintiff's boat in order to reach his own vessel, which was on fire, being under the plaintiff's care, and the boat was accidentally sunk, Lord Ellenborough was of opinion that this was not a conversion. *Drake v. Shorter*, 4 Esp. 165. So it is no conversion if the master of a ship throw goods into the sea to prevent the ship from sinking. *Bird v. Astcock*, 2 Bulstr. 280. It seems that where the defendant has done the act complained of by the licence of the plaintiff it is no conversion. Thus, if a person, against whom a commission of bankrupt has issued, acquiesces in it so far as to take a part in the sale of his own goods by recommending an auctioneer to conduct the sale, it is no conversion. *Clarke v. Clarke*, 6 Esp. 61.

It must be observed with regard to several of the above cases, that they decide what constituted a *wrongful* conversion before the new rules of pleading, when the plea of Not guilty put in issue the legality of it. Since those rules, whatever before amounted to a conversion must be so still; but an act which was not a *tortious* conversion before those rules may be a conversion *in fact* now, so as to put the defendant to a special plea of justification. See the judgment of the court in *Stanchiffe v. Hardwick*, 2 C. M. & R. 1. 11., &c.

Evidence of conversion — Demand and refusal.] A demand of the goods by the plaintiff, and a refusal to deliver them by the defendant, he having the power to deliver them, are evidence of a conversion. But being only presumptive evidence of a conversion, it may be rebutted by evidence to the contrary. 2 Saund. 47 c (n). A demand and refusal are evidence of a *prior* conversion. *Per Cur. in Willon v. Girdlestone*, 5 B. & A. 847. A refusal must be proved; mere excuses for not delivering the goods will not be sufficient. *Severin v. Keppell*, 4 Esp. 156.; *Addison v. Round*, 7 C. & P. 285. But the refusal need not be express; thus where, in trover by assignees of a bankrupt for a landau, it appeared that, after the act of bankruptcy, the bankrupt had sold the landau to the defendant, and that a written demand of it had been left by the plaintiffs at the defendant's house; but it did not appear that the latter had expressly refused to deliver it up, Richardson J. ruled that the demand, and the non-delivery in pursuance of that demand, were evidence of a conversion. *Watkins v. Woolley*, Gow. 69.

Whenever the circumstances are not such as to amount to an actual conversion, the plaintiff, in order to recover, must prove a demand and refusal. Thus, where a trader on the eve of a bankruptcy makes a collusive sale of goods to A., the assignees cannot maintain trover against A. without proof of a demand and refusal. *Nixon v. Jenkins*, 2 H. Bl. 135.; and see *Perkins v. Smith*, 1 Wils. 328.; *Jones v. Fort*, 9 B. & C. 764.; *Tennant v. Strachan*, M. & M. 377.

In order to render a demand and refusal evidence of a conversion it must appear, that, at the time of the demand made, the party had it in his power to deliver up or retain the article demanded. *Smith v. Young*, 1 Camp. 441.

There are many cases in which a refusal to deliver goods will not be evidence of a conversion. As where one B. had hired a chaise of the plaintiff and placed it at livery with the defendant, in whose possea-

sion it was attached by process out of the Sheriff's Court in an action against B.; the plaintiff demanded the chaise, which the defendant refused to deliver, alleging that it had been attached; held that this was no evidence of a conversion; the chaise being at the time of the demand in the custody of the law. *Verrall v. Robinson*, 2 C. M. & R. 495. If a person, who finds goods, refuses to deliver them to the owner until he proves his right to them, such refusal is no evidence of a conversion. *Green v. Dunn*, 3 Camp. 215 (n); *Solomons v. Dawson*, 1 Esp. 83.; *Ganton v. Nurse*, 2 B. & B. 449.; *Clark v. Chamberlain*, 2 M. & W. 78. So where goods, the property of the plaintiff, had been, by the servants of an insurance company, carried to a warehouse of which the defendant, a servant of the company, kept the key, and the defendant, on being applied to by the plaintiff to deliver them up, refused to do so without an order from the company, it was held that this refusal was no evidence of a conversion. *Alexander v. Southey*, 5 B. & A. 247. Where the widow and administratrix of an insolvent, being applied to by his assignees for papers in his possession at his death, answered that they were in the hands of her attorney, it was held that this was not sufficient evidence of a conversion. *Canot v. Hughes*, 2 New Ca. 448. But where a person, who claimed to have a lien upon goods, delivered them to a bailee, and the real owner demanded them of the latter, who refused to deliver them without the directions of the bailor, it was held that, the bailor not having any lien upon the goods, the refusal by the bailee was sufficient evidence of a conversion; and, *per* Lord Tenterden, "A bailee can never be in a better situation than the bailor. If the bailor has no title, the bailee can have none, for the bailor can give no better title than he has. The right of property may, therefore, be tried in an action against the bailee." *Wilson v. Anderton*, 1 B. & Ad. 450. A refusal by the general agent of a party is not evidence of a conversion by that party; it must be shown that, in the particular act of refusal, the agent acted under the special directions of his principal. *Per* Gibbs, C. J., *Pothonier v. Dawson, Holt*, N. P. C. 383. But proof of a refusal by the servant of a pawnbroker has been held to be evidence of a conversion by his master. *Jones v. Hart*, 2 Salk. 441. And where a bailiff wrongfully took the goods of the plaintiff, and lodged them on the defendant's premises, and the defendant's wife, in his absence, refused to deliver them up to the plaintiff, this was held evidence of a conversion by the wife, for which trover lay against husband and wife jointly. *Catterall v. Kenyon*, 3 Q. B. 310. A demand to re-deliver "in the same plight as when it came to the defendant's possession," followed by a refusal, is not evidence of a conversion. *Rushworth v. Taylor*, 3 Q. B. 699.

A demand of payment for the goods has been held a sufficient demand of the goods. *Thompson v. Shirley*, 1 Esp. 31. And service of a written demand by leaving it at the house of the defendant is good. *Logan v. Houlditch*, 1 Esp. 22. Where two independent concurrent demands have been made, one verbal and the other in writing, proof of either will be sufficient. *Smith v. Young*, 1 Camp. 440. A demand and refusal of "fixtures" is no evidence of the conversion of articles which are not fixtures. *Colegrave v. Dias Santos*, 2 B. & C. 76.

If the defendant refuses to deliver goods alleging an insufficient ground of refusal, whereupon the plaintiff brings trover, it is questionable whether the defendant can set up at the trial another and

different ground. *Coles v. Bank of England*, 10 A. & E. 444, 445., per Patteson, J.

Evidence of conversion—by whom.] The action may be brought against any person who was a party to the conversion, although the goods were actually converted by another. 2 Saund. 47 m (n). Thus if a person sues out an execution against a bankrupt, and the sheriff seizes the goods and sells them, and gives the money to the person suing out the execution, the assignees may bring trover against the sheriff or against the party suing out the execution, if he can be proved to be a party to the conversion by giving a bond to secure the sheriff, and so making it his own act. *Rush v. Baker*, B. N. P. 41. And the law seems to be the same, though A. should not give the bond, if he receives the money. S. C. 2 Stra. 996.; 2 Saund. 47 m (n).; *Nicoll v. Glennie*, 1 M. & S. 592. So where a bankrupt left some plate with his wife, who delivered it to a servant to sell, and the servant delivered it at the door of W.'s shop to the defendant, who went into the shop and pawned it in his own name, and immediately delivered the money to the servant who paid it to the wife, it was held to be a conversion by the defendant. *Parker v. Godin*, 2 Stra. 813.; B. N. P. 47.

Trover will lie against a corporation, and it is not necessary to show that the conversion was authorised by an instrument under seal. *Yarborough v. Bank of England*, 16 East, 6.; *Duncan v. Surrey Canal Co.*, 3 Stark. 50. And a corporation is liable for acts done by its agent in the course of his ordinary duty, as in distraining for dues, &c. *Smith v. Birmingham Gas Co.*, 1 A. & E. 526. Agency may be inferred from the subsequent adoption of the act by the corporation. S. C. *Ibid*.

A servant is liable in an action of trover for a conversion, though for his master's benefit. *Stephens v. Elwall*, 4 M. & S. 259.; *Alexander v. Southey*, 5 B. & A. 249. So a clerk, who refuses to re-deliver a bill of exchange indorsed to him, which he has carried to his master's account. *Cranch v. White*, 1 New Ca., 414. S. C. 1 Scott, 314.

In an action against several, a joint act of conversion must be proved in order to obtain a verdict against all. *Nicoll v. Glennie*, 1 M. & S. 588.

Evidence of conversion—tenant in common, &c.] As the possession of one jointenant, tenant in common, or parcener, is the possession of the other or others, trover cannot in general be maintained by one jointenant, &c. against his companion. Co. Litt. 200 a.; 2 Saund. 47 h (n). Thus where the plaintiff and one of the defendants were members of a friendly society, the funds of which were kept in a box deposited with them, and the defendant took away the box and delivered it to the other defendant, who was not a member of the society, it was held that the plaintiff could not maintain trover for the box. *Holliday v. Cammell*, 1 T. R. 658. So where one tenant in common of a whale refused to deliver a moiety of it to the other, and cut it up and expressed the oil, it was held that this was no conversion. *Fennings v. Lord Grenville*, 1 Taunt. 241. But if one tenant in common, &c. destroys the thing in common, trover lies. Thus where one tenant in common of a ship took it away by force and sent it to the West Indies, where it was lost in a storm, it was held to be evidence of a destruction by him so as to support an action of trover. *Barnardiston v. Chapman*, cited 4 East,

121; *B. N. P.* 34. So it is said that the sale of the whole of a chattel by one tenant in common, without authority of his co-tenant either expressed or implied, is, with respect to the other, a wrongful conversion of his undivided part. *Per* Bayley, J., *Barton v. Williams*, 5 B. & A. 403; *Heath v. Hubbard*, 4 East, 110. 126. It is, however, doubtful whether a sale by a co-tenant is a conversion, unless it be one (as in market overt) which deprives the other of his right of enjoyment, or interest in it; see *Farrar v. Beswick*, 1 M. & W. 688.

Defence.

Evidence under the general issue.] The evidence admissible under the plea of Not guilty is now governed by the rules of H. T. 4 W. 4. The general rule in actions on the Case has been already stated, and to illustrate its application, the action of trover is mentioned in the following words; "In an action for converting the plaintiff's goods, the conversion only, and not the plaintiff's title to the goods, shall be put in issue by the plea of Not guilty." The concluding part of the rule, that "all matters in confession and avoidance shall be pleaded specially," applies also to this action.

With regard to the extent to which the plea of Not guilty operates as an admission of the plaintiff's title, it has been held that it only admits *some* property sufficient to maintain the action; and that the defendant is at liberty to show, under this plea, that he is tenant in common with the plaintiff, and, therefore, that no action lies against him; or he may show that there is a tenant in common, not joined; so as to reduce the damages. *Stanchiffe v. Hardwick*, 2 C. M. & R. 1. 9. But if there be a conversion in fact, then the tenancy in common must be specially pleaded, and the conversion justified. *S. C. Ibid.*

The word "conversion," used in the rule, means only the *actual* conversion, and does not involve the *wrongfulness* of the conversion; and the plea of Not guilty consequently only puts in issue the *fact*, and not the legality or illegality of such fact. If there are any circumstances of excuse or justification which would furnish a defence, those circumstances must be specially pleaded. Thus, where the plaintiff, a wharfinger, and the defendant, a carrier, agreed to set up a waggon in common, and each party was to supply two horses, and, on a dissolution of the concern, the defendant seized and sold the two horses, supplied by the plaintiff, for the alleged purpose of paying the partnership debts; in trover for this seizure it was held that the defendant could not give this defence in evidence under the general issue, but ought to have pleaded it in confession and avoidance. *Stanchiffe v. Hardwick*, 2 C. M. & R. 1. So leave and licence of the plaintiff must be specially pleaded. *S. C. Ibid.* 11. Seizure of goods, as a distress damage feasant, is a conversion, and cannot be justified under Not guilty. *Weeding v. Aldrich*, 9 A. & E. 861. A lien is not admissible on this plea. *White v. Teal*, 12 A. & E. 106. The defendant cannot show, under the general issue, that the plaintiff had parted with his property in the goods before the conversion, but should traverse the possession. *Vernon v. Shipton*, 2 M. & W. 9.; *Barton v. Brown*, 5 M. & W. 296.

Evidence on a plea of Not possessed, &c.] This plea puts in issue the right of the plaintiff to the possession of the goods as against the defendant. Therefore the defendant may show under it that he took the

goods as assignee of a bankrupt, in whose order and disposition they were. *Isaac v. Belcher*, 5 M. & W. 139. ; *Leake v. Loveday*, 2 Doubl. N. S. 624. So a lien is evidence under it. *Owen v. Knight*, 4 New Ca. 54. ; *Brandao v. Barnett*, 1 M. & G. 908. The defendant may show a fraud which affects the plaintiff's title. *Ashby v. Minnitt*, 8 A. & E. 121. ; *Howarth v. Tollemache*, 4 M. & G. 427. Defendant sold goods to the plaintiff to be paid for on a certain day ; on default at the day, the defendant sold them to another, after tender of the price by the plaintiff : held that the plaintiff was entitled to a verdict on this plea in an action of trover for the goods. *Martindale v. Smith*, 1 Q. B. 389. Where A., the real owner, fraudulently permits another to deal with property as his own, and to sell it as such to the defendant, the defendant is entitled to succeed on a plea of Not possessed to an action of trover by A. *Gregg v. Wells*, 10 A. & E. 90. It seems that in trover by the assignees of a bankrupt, a *bonâ fide* execution against the bankrupt's goods before the fiat, and without notice of a prior act of bankruptcy, is evidence on this plea ; though that defence may also be specially pleaded. *Unwin v. St. Quintin*, 11 M. & W. 277 ; and see *Pearson v. Rogers*, 9 A. & E. 303. In trover defendant pleaded a seizure in execution against A., whose goods they were ; the replication repeated the allegation of the plaintiff's property in the goods, and issue was joined thereupon. On a finding by the jury that they belonged to A. and the plaintiff jointly, the plaintiff is entitled to a verdict. *Farrar v. Benwick*, 1 M. & W. 682. In trover for certain goods, to which the defendant pleaded Not possessed, it was found that some of the goods belonged to the plaintiff and some to the defendant ; held that the issue is divisible, and the verdict should be entered distributively. *Williams v. Great Western Railway Co.*, 8 M. & W. 856.

Evidence of general lien.] That the defendant has a lien, either general or special, on the goods, and therefore a right to the possession of them until his claim is satisfied, is a usual defence in this action. A general lien may be proved either by evidence of an express agreement, or of the mode of dealing between the parties, or of the general dealings of other persons engaged in the same employment, of such notoriety as that they may fairly be presumed to be known to the owner of the goods. *Rushworth v. Hadfield*, 7 East, 228. ; *Green v. Farmer*, 4 Burr. 2220 ; *Cumpston v. Haigh*. 2 New Ca. 449. To establish a general lien by evidence of the general usage, the instances ought to be ancient, numerous, and important. *Rushford v. Hadfield*, 6 East, 526. Where a number of tradesmen come to an agreement not to receive the goods of any person who will not consent that the goods shall be retained for a general balance, and a party, having notice of such agreement, sends his goods, he will be bound by it. *Kirkman v. Shawcross*, 6 T. R. 14. So if a carrier gives notice that all goods shall be considered subject to a lien, not only for the freight of the particular goods, but also for any general balance due from the respective owners, perhaps, as between the real owner of the goods and the carrier, that may be a binding bargain. *Per Bayley, J., Wright v. Snell*, 5 B. & A. 353. But in such case he has not, as against the real owner, any lien for the balance due to him from the party to whom the goods are addressed, the mere factor of the owner. *Ibid.* A usage for carriers to retain goods as a lien for a general balance of accounts between them

and the consignees, cannot affect the right of the consignor to stop the goods *in transitu*. *Oppenheim v. Russell*, 3 B. & P. 42. So also a carrier who, by the usage of a particular trade, is to be paid for the carriage of goods by the assignor, has no right to retain them against the consignee for a general balance due to him for the carriage of other goods of the same sort sent by the consignor. *Buller v. Woolcott*, 2 New Rep. 64. The lien of wharfingers for their general balance has been proved so often that it is to be considered a settled point. *Per* Lord Kenyon, *Naylor v. Mangles*, 1 Esp. 110.; *Spears v. Hartly*, 3 Esp. 81. A banker has a lien for his general balance upon the securities of his customers in his hands. *Jourdaine v. Lefevre*, 1 Esp. 66.; *Bolland v. Bygrave*, R. & M. 271. So calico-printers. *Weldon v. Gould*, 3 Esp. 268. A printer employed to print certain numbers, not consecutive, of an entire work, has a lien upon the copies not delivered for his general balance for the whole of those numbers. *Blake v. Nicholson*, 3 M. & S. 167. With regard to dyers a lien for their general balance has been established in several cases. *Savill v. Barchard*, 4 Esp. 53.; *Humphreys v. Partridge*, *Montagu Bank. Law*, 19 (n); *Rose v. Hart*, 8 Taunt. 499. But in other cases in which such a lien was claimed, the evidence was insufficient to establish it. *Green v. Farmer*, 4 Burr. 2214.; *Close v. Waterhouse*, 6 East, 523 (n). Attornies have a lien for their general balance on papers of their clients which come to their hands in the course of their business. *Steenenson v. Blakelock*, 1 M. & S. 535. Insurance brokers have a lien for their general balance even against agents who do not disclose their principals. *Mann v. Forrester*, 4 Camp. 60. But not where they have notice that the party who employs them is merely an agent. *Maanus v. Henderson*, 1 East, 335. Factors have a general lien. *Kruger v. Wilcox*, *Ambler*, 252. So packers, who are in the nature of factors. *Green v. Farmer*, 4 Burr. 2222.; *Savill v. Barchard*, 4 Esp. 55.

The lien of factors or agents is now regulated by stats. 6 Geo. 4. c. 94., & 5 & 6 Vict. c. 39. As to the plea under which a lien may be given in evidence, see *antè*, p. 517.

Evidence of a particular lien.] In general, where a person bestows his labour on a particular chattel delivered to him in the course of his business, he has a lien upon such chattel for the amount of his charge. Thus a miller has a lien on the corn ground by him; *ex parte Ockenden*, 1 Atk. 235.; *Chase v. Westmore*, 5 M. & S. 180.; a shipwright on a ship for repairs: *Franklin v. Hosier*, 4 B. & A. 341.; a tailor on the cloth delivered to and made up by him. *Hussey v. Christie*, 9 East, 433., *Blake v. Nicholson*, 3 M. & S. 169. So an inn-keeper, or keeper of a house of public entertainment, as a tavern or coffee-house. *Thompson v. Lacy*, 3 B. & A. 283. But an inn-keeper cannot detain the person of his guest, or take off his clothes in order to secure the payment of his bill. *Sunbolf v. Alford*, 3 M. & W. 246. A master of a vessel has a lien upon the luggage of his passengers for passage-money. *Wolf v. Summers*, 2 Camp. 631. Where goods are delivered in separate quantities at different times, yet if the work be done under one entire agreement, the right of lien for the work expended upon the whole attaches upon every part. *Chase v. Westmore*, 5 M. & S. 180. But not where there are distinct contracts. *Marks v. Lahee*, 3 New Ca. 406. A livery-stable-keeper has not a lien upon

the horses in his stable for their keep without an express agreement; *Yorke v. Grenaugh*, 2 *Ld. Raym.* 866; *Judson v. Etheridge*, 1 *C. & M.* 743; though it is otherwise of an inn-keeper. *Johnson v. Hill*, 3 *Stark.* 172. A trainer has a lien for his charge in keeping and training a horse. *Bevan v. Waters*, *M. & M.* 236. And see *Scarfe v. Morgan*, 4 *M. & W.* 270.

The vendor of goods, not sold upon credit, has a lien for the price. And where the purchaser of goods, upon which the seller has a lien, obtains possession of them by fraud, the seller has still a right to the possession, and may maintain trover for them. *Hawse v. Crowe*, *R. & M.* 414. It is no answer to a special lien that the plaintiff has a set-off to a larger amount against the defendant; unless there is an agreement to deduct one debt from the other. *Pinnock v. Harrison*, 3 *M. & W.* 532.

Evidence of lien — cases in which a lien does not arise.] It was formerly thought that a lien does not arise where there is an express contract between the parties relative to the price, &c., but only in cases of implied contract; but it is now settled that a special agreement does not of itself destroy the right to retain, unless it contains some term inconsistent with that right. Thus where corn is delivered to a miller to be ground at a certain stipulated sum per load, the miller has a lien for that sum. *Chase v. Westmore*, 5 *M. & S.* 180. But if by the agreement the purchaser of goods is entitled to have the goods immediately and the payment in respect of them is to take place at a future time, that is inconsistent with the right to retain till payment, and the seller will have no lien for the price. *Crawshaw v. Homfray*, 4 *B. & A.* 52. Where wharfage due upon goods is by the course of trade payable at Christmas, whether the goods are in the mean time removed or not, there arises no lien on the goods for the wharfage. *Id.*

In general a lien cannot arise unless the party claiming it has possession of the goods. *Kinloch v. Craig*, 3 *T. R.* 119. 783; *Taylor v. Robinson*, 8 *Taunt.* 648. And where a party obtains the possession of goods by misrepresentation, he cannot claim a lien upon them, though, had they come rightfully to his hands, he might have been entitled to retain them. *Madden v. Kempster*, 1 *Camp.* 12; *Lempriere v. Pauley*, 2 *T. R.* 485.

In order to establish a lien it must appear that the work, &c. in respect of which it is claimed, was done at the request of the owner of the goods detained; and therefore, where a servant took his master's chaise, which had been broken by his negligence, to a coach-maker to be repaired without his master's knowledge, it was ruled that the coach-maker had no right to retain the chaise against the master for the repairs. *Hiscox v. Greenwood*, 4 *Esp.* 174.

Evidence of lien — when waived.] A party entitled to a lien may waive it by not insisting upon it when the goods are demanded from him; as when, instead of relying on a lien, he claims them as his own. *Boardman v. Sill*, 1 *Camp.* 410 (n); or claims to hold them as a lien for a debt due from a third party; *Dirks v. Richards*, 4 *M. & G.* 574; or where the defendant, having a lien for freight, refused to deliver the goods on the ground that he had signed a bill of lading for delivery to a third person; *Thompson v. Trail*, 6 *B. & C.* 36; or where the defendant,

having a particular lien, claims to hold for an old balance ; in which case an actual tender of the money covered by the particular lien is not necessary. *Jones v. Turlton*, 9 *M. & W.* 675. See *Scarfe v. Morgan*, 4 *M. & W.* 270. So he may waive it by parting with the possession ; as where the goods are taken in execution at his own suit. *Jacobs v. Latour*, 5 *Bing.* 130. Where a coach-maker repaired a carriage and allowed the owner to take it away, it was ruled that he could not retain it for the past repairs when again brought to him. *Hartley v. Hitchcock*, 1 *Stark.* 408. ; and see *Jones v. Pearle*, 1 *Str.* 557. And where the party entitled to a lien wrongfully parts with the goods, the owner may recover them from the holder without tendering what is due on the lien ; for a party is only obliged to make a tender where it is necessary to give him the right to the possession of the goods. *Scott v. Newington*, 1 *M. & Rob.* 252. ; *Jones v. Cliff*, 1 *C. & M.* 540. ; *S. C.* 3 *Tyrwh.* 576. Where a bailee of goods, who had a lien, delivered them to a carrier on account of the bailor, and afterwards stopped the goods *in transitu*, and got possession of them again, it was held that the lien did not revive. *Sweet v. Pym*, 1 *East*, 4. But the lien of an insurance broker (who has a general lien) revives on re-possession of the policy. *Whitehead v. Vaughan, Co. Bank. Law*, 547., 7th ed. ; *Levy v. Barnard*, 8 *Tam.* 149. And where horses, on which a livery-stable-keeper had by agreement a lien, were fraudulently taken out of his possession by the owner, it was ruled that the stable-keeper having without force retaken the horses, his lien revived. *Wallace v. Woodgate, R. & M.* 193. Where the owner of a ship, having a lien on the goods until the delivery of good and approved bills for the freight, took a bill of exchange in payment, and afterwards negotiated it, it was held that such negotiation amounted to an approval of the bill by him, and that his lien on the goods was waived. *Horncastle v. Farran*, 3 *B. & A.* 497. ; *Stevenson v. Blakelock*, 1 *M. & S.* 535. Where the seller of goods recovered a verdict for goods bargained and sold, it was ruled by Lord Ellenborough, that he had not thereby waived his lien, though it might have been otherwise had he recovered a verdict for goods sold and delivered. *Houlditch v. Desanges*, 2 *Stark.* 337. A lien is not destroyed though the demand, in respect of which it arises, is barred by the statute of limitations. *Spears v. Hartly*, 3 *Esp.* 81.

Where goods, upon which the captain of a ship has a lien, are deposited in the king's warehouse in pursuance of the requisition of an act of parliament, the lien is not thereby waived. *Per Lord Kenyon, C. J., Ward v. Felton*, 1 *East*, 512. ; *Wilson v. Kymer*, 1 *M. & S.* 167.

Replication of a tender to a plea of lien.] Where the defendant pleaded a lien specially, and the plaintiff replied a tender of a large sum, "to wit, 100*l.*," being a sufficient sum, and issue was joined on the sufficiency of the tender, the Court of Common Pleas held that the sum specified was material though laid under a *videlicet*. *Marks v. Laher*, 3 *New Ca.* 408. As to proof of tender by entries in the books of a deceased clerk, see *anté*, p. 36.

Stoppage in transitu.] In trover it frequently happens that the defence arises out of the right of a vendor of goods to stop them *in transitu* upon the insolvency of the vendee. And he may do so, though he has received the acceptance of the consignee, without tendering back the

bill. *Edwards v. Brewer*, 2 M. & W. 375. Whether stoppage *in transitu* is a revesting of the possession, or a rescinding of the contract and a revesting of the right of property, has never been expressly decided. See *Clay v. Harrison*, 10 B. & C. 106.; *Wentworth v. Outhwaite*, 10 M. & W. 436.

In general every unpaid vendor of goods has a right, on the insolvency of the vendee, to stop the goods, if still on their way to the vendee. A person abroad, who in pursuance of orders from a merchant in this country, purchases goods on his own credit from persons abroad, unknown to the merchant, and consigns them to his principal here, charging him a commission, is a vendor within the rule. *Feise v. Wray*, 3 East, 93. So also is a person who sends goods to be sold on the joint account of himself and the consignee. *Newsom v. Thornton*, 6 East, 17. But a person who accepts bills drawn for the price of the goods, by the vendor, is merely a surety for the price, and is not a vendor or consignor so as to be entitled to stop the goods *in transitu*. *Siffken v. Wray*, 6 East, 371. The stoppage of part of the goods will not revest the property in the whole, though comprised in one entire contract. *Wentworth v. Outhwaite*, 10 M. & W. 436. See *Jones v. Jones*, 8 M. & W. 431.

Stoppage *in transitu* is usually pleaded specially; but whether it operates to rescind the contract, or to give the defendant a right of possession as against the plaintiff, it seems, on principle, to be admissible on the plea of Not possessed, &c.

Stoppage in transitu — continuing transitus.] A *transitus* is said by Lord Mansfield to be "every sort of passage to the hands of the buyer." *Stokes v. La Riviere*, cited 3 East, 397. Where there is a contract for the sale of goods, and a delivery has been made to a middle man, who is merely the vehicle between the buyer and seller, the latter, in case of the insolvency of the former, may stop them at any time before they have arrived in such a state as to be in the actual or constructive possession of the buyer. *Mills v. Ball*, 2 B. & P. 461.

The *transitus* is continuing though the goods have arrived at an intermediate stage. Thus where goods were ordered by a person at Newcastle from the plaintiff at Birmingham, and were directed to be sent by way of London, addressed to the defendant at the Bank Wharf with directions to send them by the first vessel to Newcastle, it was ruled that they might be stopped at London; it being merely a stage upon their transit. *Smith v. Goss*, 1 Camp. 282. So where goods were ordered by a trader at North Tawton from the plaintiff in London, and directions were given to send them to Exeter to be forwarded to North Tawton, and they were accordingly put into the hands of a wharfinger to be forwarded, it was held that while in his hands they might be stopped by the vendor. *Mills v. Ball*, 2 B. & P. 457. "The principle to be deduced from the cases is, that the *transitus* is not at an end until the goods have reached the place named by the buyer to the seller as the place of their destination." *Per* Bailey, J., *Coates v. Railton*, 6 B. & C. 427; *Edwards v. Brewer*, 2 M. & W. 375. And evidence is admissible to show that the consignee has not taken possession of the goods as owner. *James v. Griffin*, 2 M. & W. 623.

Whether, where the goods have not arrived at their place of destination, and the consignee goes out to meet them and takes possession

of them before their arrival, the right of the vendor to stop them is determined, does not appear to be quite decided. Lord Kenyon ruled that the possession of the purchaser, to defeat the right, must be a possession obtained on the completion of the voyage; *Holt v. Pomeroy*, 1 Esp. 240.; but a different opinion has been expressed in other and later cases; see Lord Alvanley, in *Mills v. Ball*, 2 B. & P. 461.; Chambre, J., in *Oppenheim v. Russell*, 3 B. & P. 54.; *Foster v. Frampton*, 6 B. & C. 107.; Parke, B., in *James v. Griffin*, 2 M. & W. 631. At all events a mere demand by the consignee before the end of the voyage will not defeat the right. *Jackson v. Nichol*, 5 New Ca. 506.

Where the goods delivered to a carrier, or other middleman, have been received by the vendee into his own hands, the *transitus* is of course determined. But actual and corporal possession is not necessary. Thus, if a man be in the habit of using the warehouse of a wharfinger, &c., as his own, and making it a repository of his goods, and disposing of them there, the journey will be at an end when the goods arrive at that warehouse. *Richardson v. Goss*, 3 B. & P. 127. Goods were ordered from the plaintiffs at Manchester by M., the agent of G. of Paris, and were directed to be sent to the house of the defendant, a packer in London. M. had some of the goods unpacked there, and the remainder repacked. He had a general power either to forward the goods to G., or to send them to Holland, &c. It was held that the defendant received the goods on account of M., and that, as they were to await his disposal in the defendant's warehouse, the *transitus* was there at an end. *Leeds v. Wright*, 3 B. & P. 320.; see also *Scott v. Pettit*, 3 B. & P. 469.; *Roue v. Pickford*, 8 Taunt. 83.; *Dodson v. Wentworth*, 5 Scott, N. R. 821.

Though the goods remain in the actual possession of the carrier, yet, if the purchaser has done any act equivalent to taking possession, the right of the vendor to stop them is determined. Thus where goods were ordered from the plaintiff at Sheffield, and were sent by waggon directed to the purchaser in London, where they were brought to the waggon-office, and the provisional assignee of the purchaser, who had become bankrupt, put his mark upon them there, being unable to remove them in consequence of an attachment, the *transitus* was held to be at an end. *Ellis v. Hunt*, 3 T. R. 464.; and see *Foster v. Frampton*, 6 B. & C. 107.

Upon the same principle it has been held that, where goods are ordered to be sent by sea from a distance, if the shipmaster gives a receipt to the vendee, bearing that the goods are received from him, the right of stoppage is determined, the vendors, by empowering the carrier to give the receipt, recognising the right of property in the vendee. *Noble v. Adams*, Holt, N. P. C. 248. On the other hand where the receipt was given to the vendors, it was held that the captain of the vessel, who had given such receipt and had afterwards delivered up the bill of lading to a purchaser from the vendee, was liable to the vendors who had stopped the goods, on the ground that the person holding the receipt has a control over the goods till he has exchanged it for the bill of lading. *Craven v. Ryder*, Holt, N. P. C. 100., S. C. 6 Taunt. 433; *Ruck v. Hatfield*, 5 B. & A. 632.

Stoppage in transitu — how defeated or divested.] The right to stop in *transitu* is defeated by the delivery of part of goods sold under one entire contract, if such delivery of part appears to have been intended

as a delivery of the whole. Where eight hundred bushels of wheat, part of an entire cargo, were delivered, it was held that it must be taken to be a delivery of the whole. *Skubey v. Heyward*, 2 H. Bl. 504. So where the goods were in the hands of a wharfinger, and the purchaser weighed the whole and took away twenty-five bales, leaving the remainder on the wharf, it was held that this amounted to taking possession of the whole, and that the privilege of stopping *in transitu* could not attach. *Hammond v. Anderson*, 1 New. Rep. 69. "There can be no doubt that, wherever there is a complete delivery of part of one entire cargo to the consignee, the transitus is ended, and the consignor cannot stop the remainder." *Per* Bayley, J., *Crawshay v. Eades*, 1 B. & C. 183. But where a carrier, having landed a part of the goods on the wharf of the consignee, resumed them, and took the whole to his own premises in order to secure his own demand for freight, this was held not to be such a delivery as to put an end to the consignor's right. *Crawshay v. Eades*, 1 B. & C. 181. If the act of delivering part is not intended to operate as a delivery of the whole, but as a delivery of a portion only, this will not deprive the vendor of his lien on the goods undelivered. *Dixon v. Yates*, 5 B. & Ad. 313; *Bunney v. Poyntz*, 4 B. & Ad. 570.

The most usual way in which the right of a vendor to stop goods *in transitu* is defeated is by assigning the bill of lading to a *bonâ fide* assignee. This point was established in *Lickbarrow v. Mason*, 2 T. R. 63., S. C. 1 H. Bl. 357.; 5 T. R. 367. 683.; *Abbott on Shipping*, 398. The assignment must, it seems, be for a valuable consideration in order to defeat the right to stop; for though it has been held that where the vendor of goods assigns the bill of lading to his agent, who stops them, such agent has a sufficient title to sue for them in trover (*Morison v. Gray*, 2 Bing. 260.), yet it has never been held that such an assignment by the vendee will have the effect of divesting the vendor's title to stop. *Waring v. Cox*, 1 Camp. 369.; *Coxe v. Harden*, 4 East, 217. Not only must the assignee have given a valuable consideration for the bill of lading, but he must also have acted with fairness and honesty. It is said, by Lord Ellenborough, that if he assists in contravening the actual terms of sale on the part of the consignor, or his reasonable expectations arising out of them, or his rights connected therewith, he will stand in the same situation with the consignee. If, for instance, he knows that the consignee has been in insolvent circumstances, and that no bill has been accepted by him for the price, or that, being accepted, it is not likely to be paid, in that case, the interposition of himself between the consignor and the consignee, to assist the latter in disappointing the just expectations of the former, will be an act done in fraud of the right to stop, and unavailable to the party taking the assignment. *Cuming v. Brown*, 9 East, 514. Therefore, where a person, knowing that the goods are not paid for, takes an assignment of the bill of lading, and agrees to pay for them, the goods not having been paid for, he cannot resist the right of the vendor to stop. *Salomons v. Nissen*, 2 T. R. 674. But the knowledge, that the consignor has not received a money payment, but has taken the acceptance of the consignee, will not prevent the assignment from destroying the right to stop. *Cuming v. Brown*, 9 East, 506.; *Jones v. Jones*, 8 M. & W. 431. The criterion in these cases is, does the purchaser take the assignment fairly and honestly? *Salomons v. Nissen*, 2 T. R. 681.; *Cuming v. Brown*, 9 East, 516.

An actual indorsement and delivery of the bill of lading is not essential to defeat the right of stoppage. The property may be transferred by the consignee under circumstances equivalent to an indorsement. *Dick v. Lumden, Peake*, 189.; *Davis v. Reynolds*, 4 Camp. 267.

The rights of the parties may depend upon the state of things when the bill of lading was signed and indorsed; thus, where the consignor was indebted to the consignee on the balance of accounts, including bills of exchange, still running, accepted by the consignee for him, it was held that goods shipped on account of this balance could not be stopped by the consignor upon the consignee becoming insolvent before the bills were paid. *Vertue v. Jewell*, 4 Camp. 31.

While the goods remain in the hands of the vendor's agent, the right to stop them, on the insolvency of the vendee, may also be divested in other ways. Thus, where goods in the hands of a warehouseman were sold, and the vendor gave a delivery order to the purchaser, which he lodged with the warehouseman, who transferred the goods in his books into the purchaser's name, this was held to be equivalent to an executed delivery, and to divest the vendor's right; and that as to a parcel of the goods which had not been transferred, the delivery order alone was sufficient to divest the right. *Harnes v. Anderson*, 2 Camp. 243. So where goods are lodged in dock, the indorsement of the dock warrant for a valuable consideration will divest the vendor's right; *Spear v. Travers*, 4 Camp. 251.; *Zwinger v. Samuda*, 7 Taunt. 265.; and the delivery of the warrant is sufficient without any transfer being made in the books of the dock company. *Keyser v. Suse*, Gow, 58. So where a warehouseman sold goods, and received warehouse rent from the purchaser, Lord Ellenborough ruled that this put an end to the right to stop, as much as if the goods had been removed to the purchaser's own warehouse. *Hurry v. Mangles*, 1 Camp. 452. So the change of mark from A. to B. on bales of goods in a warehouse was held to operate as an actual delivery of the goods. Lord Ellenborough, C. J., in *Stoveld v. Hughes*, 14 East, 308.; *Swanwick v. Sothorn*, 9 A. & E. 895.

But where any thing is to be previously done on the part of the seller to ascertain the amount of the price, or to ascertain and perfect the specific subject of the sale (such as weighing the goods, &c.) an order for delivery may be countermanded before such previous act be done; *Abbott*, 879.; and the vendor may consequently stop the goods. *Wihers v. Lyss*, 4 Camp. 237., *S. C. Holt*, N. P. C.; *Shepley v. Davis*, 5 Taunt. 617.; *Busk v. Davis*, 2 M. & S. 397.

[*Statute of Limitations.*] Where the possession was originally legal, the statute runs from the demand and refusal, and no previous demand and refusal will be presumed. *Topham v. Braddick*, 1 Taunt. 577., per Lawrence, J. But it seems that the defendant might, under this plea, show a previous conversion more than six years ago. A jury, however, will not be directed to presume one from equivocal evidence, as from an earlier demand by the plaintiff; for this would be setting up the defendant's own wrong to defeat the action. *Philpott v. Kelley*, 3 A. & E. 106. Where indeed there has been no such conversion as to disabie the defendant from restoring the chattel, the detention seems to be a continuing wrong, for which trover will probably lie after any

demand and refusal to re-deliver it. The action of detinue is, at all events, free from this difficulty.

Damages.] Where the defendant wrongfully detained from the plaintiff a bill for 1600*l.*, and got 800*l.* upon it, yet the plaintiff is entitled to the full amount as damages. *Alager v. Close*, 10 *M. & W.* 576. In trover for a guarantee, the plaintiff is entitled to the sum recoverable on it by him though mutilated by the defendant; and, if unstamped, the expense of stamping must be deducted. *M'Leod v. M'Ghie*, 2 *M. & G.* 326.

Trover for coals: The action was brought to try the right to the mines, which had been worked by the defendant, and turned on the effect of an old deed. Parke B. directed the jury that if there was fraud or negligence in the defendant, they might give the full value of the coal without deduction for expenses, &c.; but if he acted honestly in a belief that he was entitled to the mines, the proper damages would be the value, as if the coal field had been bought by the defendant from the plaintiff. The jury gave for damages a certain sum per acre on the latter estimate, and the direction was acquiesced in by the plaintiff's counsel. *Wood v. Morewood*, 3 *Q. B.* 440 (n).

Although the defendant cannot, under the general issue, object that another part owner of the goods has not been joined as plaintiff, so as to defeat the action; see *Bloxam v. Hubbard*, 5 *East*, 420.; yet he may give that fact in evidence in order to reduce the plaintiff's damages to the amount of his own share. *Nelthorpe v. Dorrington*, 2 *Lea*. 113. If the defendant only pleads that he did not convert the goods, he cannot cross-examine the plaintiff's witnesses to show, in mitigation of damages, that the goods really belonged to a third person. *Finch v. Blount*, 7 *C. & P.* 478. Whether, in an action by a rightful executor against an executor *de son tort*, the latter may prove, in mitigation of damages, that he has paid the debts of the deceased, see *post*, tit. *Actions by Executors*.

Though a conversion cannot be purged, yet the defendant may show, in mitigation of damages, that he has returned the goods. *Countess of Rutland's case*, 1 *Rol. Ab.* 5. Special damages may be recovered in this action, if laid in the declaration. *Davis v. Oswell*, 7 *C. & P.* 804. Where defendant, a sheriff who held goods taken in execution, delivered them to the plaintiffs, assignees of a bankrupt, after trover brought against him by the plaintiffs, and the plaintiffs accepted them without condition, it was held that they could not recover more than nominal damages; at all events not without alleging special damage. *Moon v. Raphael*, 2 *New Ca.* 310.

EVIDENCE IN ACTIONS BY AND AGAINST PARTICULAR PERSONS.

ACTIONS BY ASSIGNEES OF BANKRUPTS.

IN an action by the assignees of a bankrupt, the plaintiffs may be called upon to prove the bankruptcy, and the plaintiffs' title to sue.

The principal statute now in force respecting bankrupts is 6 Geo. 4. c. 16. ; but material alterations in the law and practice in bankruptcy, and in the constitution of the bankruptcy courts, are contained in *stats.* 1 & 2 W. 4. c. 56., and 5 & 6 Vict. c. 122. Most of the cases under the following heads were decided upon the old statutes of bankruptcy, but they will be generally found equally applicable to the present state of the law.

Strict proof of title of assignees — what constitutes.] Whenever assignees are required to give strict proof of their title, they must be prepared with evidence, 1, Of the petitioning creditor's debt ; 2, Of the trading ; 3, Of the act of bankruptcy ; 4, Of the commission or fiat ; and 5, Of the assignment or appointment of the assignees.

Evidence of petitioning creditor's debt — nature and date of.] The petitioning creditor's debt is to be proved in the same manner as in an action against the bankrupt himself. *Abbot v. Plumbe*, 1 Doug. 217. Where the debt arose on a bond, an acknowledgment of the debt by the obligor was held not to supersede the necessity of calling the attesting witness. *S. C.* 16. But as the admission of the party is now held to dispense with proof of a written document, this case is perhaps questionable. See *anté*, p. 38.

It must appear that the debt was in existence at the time of the act of bankruptcy. *Clarke v. Askew*, 1 Stark. 458 (n). So where the petitioning creditor's debt arises on a promissory note dated before the bankruptcy, the note, it has been said, must be proved to have existed prior to the act of bankruptcy ; for the date is not even *prima facie* evidence of that fact ; 2 Stark. Ev. 161. ; where a contrary decision in *Taylor v. Kinloch*, 1 Stark. 175. is said to be erroneous. In *Wright v. Lainson*, 2 M. & W. 739., it was held that an I. O. U., bearing date before the bankruptcy of a trader, constituted no evidence of a petitioning creditor's debt without some proof that it was in existence before the bankruptcy ; and this appears to be now settled. See the judgment in *Anderson v. Weston*, 6 New Ca. 296. 301. ; and the observations of Lord Abinger and Alderson B., in *Doe v. Milburn*, 2 M. & W. 859, 860. But where a note was proved to be in existence before the docket was struck, and bore date on the face of it before the act of bankruptcy, this was considered *prima facie* proof that the note was in existence before the act of bankruptcy. *Obbard v. Betham*, M. & M. 486. ; see also *anté*, p. 20. So, if it can be shown that, about

the date of the bill, goods were sold of corresponding amount. *Cowie v. Harris*, *M. & M.* 141. Where the petitioning creditor is the indorsee of a bill, the indorsement must be proved to have been made before the commission (or fiat) issued; and the date of the bill affords no presumption as to the time of the indorsement. *Rose v. Rowcroft*, 4 *Camp.* 245. But the indorsement may be after the act of bankruptcy. *Glaister v. Hewer*, 7 *T. R.* 498. If the debt be proved to have existed before the act of bankruptcy, its continued existence up to the act will be presumed; *Jackson v. Irwin*, 2 *Camp.* 50.; unless there have been intermediate transactions tending to defeat the presumption. *Gresly v. Price*, 2 *C. & P.* 48.

It must appear that the debt was contracted while the party was a trader, or, if contracted before, was *subsisting* while he was a trader. *Meggot v. Mills*, 1 *Ld. Raym.* 286.; *Baile v. Grant*, 9 *Bing.* 121. Where a person contracted a debt, and afterwards became a trader, and the debt still remaining unpaid, he went out of trade, and afterwards committed an act of bankruptcy, a commission, founded on this debt and act of bankruptcy, was held to be valid. *Baillie v. Grant*, 1 *Clark & F.* 238. If there was a petitioning creditor's debt at the time of the act of bankruptcy on which a commission might have issued, and there was a petitioning creditor's debt still existing at the time of the commission, it does not signify what happened in the interim as to the payment of the first debt; the balance throughout continuing sufficient for a petitioning creditor's debt. *Shaw v. Harvey*, *M. & M.* 526.

Taking a security of a higher nature, after the act of bankruptcy, for a debt of an inferior nature contracted before, will not prevent the original debt being a good petitioning creditor's debt. *Ambrose v. Clendon*, 2 *Stra.* 1042. Nor will the fact that the debtor has become insolvent, and included the debt in his schedule. *Jellis v. Mountford*, 4 *B. & A.* 256.; *Ex parte Shuttleworth*, 2 *Glyn. & J.* 68. And a debt upon an attorney's bill, not signed and delivered according to the statute, is sufficient. *Ex parte Sutton*, 11 *Ves.* 163.; *Ex parte Howell*, 1 *Rose*, 312. But a verdict for damages in an action for breach of promise of marriage does not, before judgment, constitute a debt. *Ex parte Charles*, 14 *East*, 197. And where the debtor is taken in execution, there is no good debt to support a commission. *Cohen v. Cunningham*, 8 *T. R.* 123. Taxed costs upon a judgment as in case of a nonsuit under a rule of court, do not constitute a good petitioning creditor's debt; being recoverable only by attachment. *Ex parte Stevenson*, *Mon. & Mac.* 263. The debt must be a legal one; therefore a promissory note made in violation of the statutes for the protection of the Bank of England cannot be proved; *Ex parte Randleson*, *Mon. & Mac.* 86.; and consequently cannot form a petitioning creditor's debt.

In case of a partnership, an account rendered and balance struck will support a commission; and where A. advanced 200*l.* to B. to set up trade, and it was agreed that A. should have one-eighth of the profits, it was held that this advance formed a good petitioning creditor's debt. *Ex parte Nolley*, 1 *Mont. & Ayr.* 46.

Where there is only one petitioning creditor, there must be a debt to him separately, for which he alone might maintain an action at law; and therefore a commission cannot be supported on the petition of one of two partners, to whom a joint debt is due. *Buckland v. Newsame*, 1 *Taunt.* 477., *S. C.* 1 *Camp.* 474.

Where the petitioning creditor is assignee of another bankrupt, and the debt is due to him in that character, and his title comes incidentally in question, strict evidence of his title as assignee must be given; *Doe v. Liston*, 4 Taunt. 741.; but where, in an action by such assignee, no notice to dispute had been given under the statute, the depositions under the commission were held evidence of debt due to the petitioning creditor in the character in which he claimed it, and no other evidence of the first bankruptcy was in such case necessary. *Skiffe v. Howard*, 2 B. & C. 560. So where the petitioning creditor's debt was due to him as executor, proof of probate would not be necessary under such circumstances. Per Abbott, C. J., *ib.* See also *Muskett v. Drummond*, 10 B. & C. 153.

Where a new petitioning creditor's debt has been substituted under 6 Geo. 4. c. 16. s. 18., it is sufficient to prove the petition to the Chancellor for the substitution, the Chancellor's order referring the sufficiency of the debt to the commissioner, and the finding of the commissioner thereon. It is not necessary to produce the Chancellor's order confirming such finding. *Batchelor v. Vyse*, 1 M. & Rob. 331.

Evidence of petitioning creditor's debt, amount of.] The debt of the petitioning creditor must amount, if it is to one creditor or one firm, to 50*l.*; if to two, to 70*l.*; if to more, to 100*l.*; 5 & 6 Vict. c. 122. s. 9. 100*l.* in notes, bought at 10*s.* in the pound, is a sufficient petitioning creditor's debt to the larger amount. *Ex parte Lee*, 1 P. Wms 782. Where a creditor to the amount of 112*l.* after notice of an act of bankruptcy received 50*l.*, it was held that, as that payment was void, there was still a good petitioning creditor's debt. *Mann v. Shepherd*, 6 T. R. 79.; 1 Buck, 283.

Evidence of petitioning creditor's debt — admission of bankrupt.] The admissions of the bankrupt himself are frequently given in evidence to establish the petitioning creditor's debt. Thus an entry in the bankrupt's books; *Watts v. Thorpe*, 1 Camp. 376.; or an account signed by him, charging himself, *Hoare v. Coryton*, 4 Taunt. 560.; is sufficient evidence of the debt, provided it be shown that the entry, or account, was made before the act of bankruptcy. An admission by the bankrupt of the debt, made after the act of bankruptcy but before the issuing of the commission, is not evidence. *Smallcombe v. Bruges*, 1 McClell. 48., S. C. 13 Price, 136. But where the debt was founded on a bill of exchange of which the bankrupt was drawer, it was held that the bankrupt's declaration, made after the act of bankruptcy and before the commission, that the bill would not be paid, was admissible evidence to supply the proof of notice. *Brett v. Levett*, 13 East, 213.

Evidence of petitioning creditor's debt — bills of exchange, and debts due on credit.] As a bill of exchange is a debt from the date of it as against the drawer, it is a sufficient petitioning creditor's debt, though not indorsed to the creditor till after an act of bankruptcy. *Macarty v. Barrow*, 2 Stra. 949.; *Glaister v. Hewer*, 7 T. R. 498. But if the creditor be indorsee, it must appear that the bill was indorsed to him before the commission issued. *Rose v. Rowcroft*, 4 Camp. 245.;

Re parte Botten, 1 Mont. & B. 412. By 6 Geo. 4. c. 16. s. 15. (repeated in 5 & 6 Vict. c. 122. s. 9.) every person who has given credit to any trader, upon valuable consideration, for any sum payable at a certain time, which time shall not have arrived when such trader committed an act of bankruptcy, may petition, or join in petitioning, whether he shall have any security in writing, or otherwise, for such sum or not. Where A. having drawn a bill in favour of B., to whom he was previously indebted in that amount, committed an act of bankruptcy before either the bill was due or had been presented for acceptance, it was held that such bill of exchange was a good petitioning creditor's debt, though subsequently to the commission it had been duly presented to and paid by the acceptors. *Ex parte Douthat*, 4 B. & A. 67. Where the debt was an acceptance of the bankrupt, and the assignees had had notice to prove the consideration, it was held that, though they were not bound to prove the consideration until impeached, yet, not having adduced any evidence, and the jury, from circumstances of suspicion attached to the case, having found a verdict for the defendant, the court would not disturb that verdict. *Abraham v. George*, 11 Price, 423. Two persons exchange acceptances, and, before the bills are mature, one of them commits an act of bankruptcy; this is not such a debt due from him to the other as will sustain a commission before the other has paid his own acceptance. *Sarratt v. Austin*, 4 Taunt. 200. Interest, where not expressed in the body of the bill, cannot be added so as to make up the amount of the debt. *Cameron v. Smith*, 2 B. & A. 305.; *Ex parte Burgess*, 8 Taunt. 660. A bill, though not due till after the act of bankruptcy, is a good petitioning creditor's debt to support a commission against the drawer; and the rebate of interest is not to be considered; for it is a present debt to the amount. *Brett v. Levett*, 13 East, 213.

Evidence of petitioning creditor's debt — prior act of bankruptcy.] By 6 Geo. 4. c. 16. s. 19. no commission shall be deemed invalid by reason of any act of bankruptcy prior to the debt of the petitioning creditor, provided there be a sufficient act of bankruptcy subsequent to such debt. Before this statute, though the bankrupt himself could not, yet a debtor to the estate might, in an action by the assignees, resist the claim and defeat the commission by proof of an act of bankruptcy prior to the petitioning creditor's debt, and of a sufficient debt upon which a commission might be supported. *Eden*, 43.

Evidence of trading.] By 6 Geo. 4. c. 16. s. 2. it is enacted, that all bankers, brokers, and persons using the trade of scrivener receiving other men's monies or estates into their trust or custody, and persons insuring ships, or their freight, or other matters, against perils of the seas; warehousemen, wharfingers, packers, builders, carpenters, shipwrights, victuallers, keepers of inns, taverns, hotels, or coffee-houses, dyers, printers, bleachers, fullers, calenderers, cattle or sheep salesmen, and all persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail, and all persons who, either for themselves or as agents or factors for others, seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities, shall be deemed traders liable to become bankrupt; provided that no

farmer, grazier, common labourer, or workman for hire, receiver-general of the taxes, or member of or subscriber to any incorporated commercial or trading companies established by charter or act of parliament, shall be deemed, as such, a trader liable by virtue of this act to become bankrupt.

By 5 & 6 Vict. c. 122. s. 10. livery-stable keepers, coach-proprietors, carriers, ship-owners, auctioneers, apothecaries, market-gardeners, cow-keepers, brick-makers, alum-makers, lime-burners, and millers, are to be deemed traders within the bankrupt laws.

The bankrupt act applies to aliens, denizens, and women; and a feme covert may be a bankrupt, whenever she can by law be a sole trader apart from her husband. *Lavie v. Phillips*, 3 Burr. 1776.; *Ex parte Franks*, 7. Bing. 762. A commission against an infant is void, and not merely voidable. *Belton v. Hodges*, 9 Bing. 365.

Evidence of a trading which ceased before the statute took effect, will not support a commission of bankrupt issued after that time; *Surtees v. Ellison*, 9 B. & C. 750.; but evidence of a trading before the statute is admissible to show *quo animo* acts were done after the statute. *Worth v. Budd*, 2 B. & Ad. 172.

Declarations of the bankrupt, made before the bankruptcy, have been admitted to prove the trading in an action brought by him against the assignees to dispute the commission. *Parker v. Barker*, 1 B. & B. 9. But in an action by the assignees against a third person, such evidence was held by Best C. J. clearly inadmissible. *Bromley v. King, R. & M.* 228. Where the question was as to the intention with which the party had made certain purchases, his declarations at the time of the purchase of the goods as to the mode in which he intended to dispose of them are admissible to prove the trading. *Gale v. Halfknight*, 3 Stark. 56.

Evidence of trading — what persons are traders within the general words of 6 Geo. 4. c. 16. s. 2.] To prove a person a trader within the general words of the act, evidence of both buying and selling is necessary. *Eden*, 3. But where the buying is proved, the intention to sell again may be proved by the declarations as well as the acts of the bankrupt. *Gale v. Halfknight*, 3 Stark. 56.; *Miliken v. Brandon*, 1 C. & P. 380. The quantum of dealing is immaterial, when coupled with the intention to continue it. *Patman v. Vaughan*, 1 T. R. 572.; *Newland v. Bell, Holt*, N. P. C. 221. Thus the purchase of one lot of timber, and the sale of a portion of it, will make a man a trader. *Holroyd v. Gwynne*, 2 Taunt. 176. But such occasional acts, as a schoolmaster selling books to his own scholars only; *Valentine v. Vaughan, Peake*, 76.; a colonel of a fencible regiment selling horses occasionally at Tattersall's; *Ex parte Blackmore*, 6 Ves. 3.; or a person, who keeps hounds, buying dead horses, and selling the skins and bones; *Summersett v. Jarvis*, 3 B. & B., 2., S. C. 6 B. Moore, 56., are not alone evidence of trading. And where a person buys more of an article than he wants, and sells the surplus, he does not thereby become a trader. *Newland v. Bell, Holt*, N. P. C. 222. Nor a farmer buying and selling articles incidental to the occupation of his farm; as where a farmer buys pigs, feeds them on his stubbles, and resells them, some after a week, some after longer periods. *Patten v. Broune*, 7 Taunt. 409.; *Martin v. Nightingale*, 3 Bing. 421. But where a farmer bought horses unfit for farming, and resold them, and

avowed his intention to take out a license and become a horse-dealer, these facts were held to be evidence of trading. *Wright v. Bird*, 1 Price, 20. A drawing and re-drawing of bills of exchange and promissory notes, if there be a continuation of it with a view to gain a profit on the exchange, is a trafficking in exchange and a trading. *Richardson v. Bradshaw*, 1 Atk. 128.; *Hankey v. Jones*, Cowp. 745.; *Eden*, 4. Where the business of brickmaking was carried on as a mode of enjoying the profits of a real estate, it would not, before 5 & 6 Vict. c. 122., have made the party liable to the bankrupt law, unless carried on substantially and independently as a trade. *Paul v. Dowling*, M. & M. 263.; *Heane v. Rogers*, 9 B. & C. 577.

Whether a trader who has ceased to buy, but is selling off his stock, is liable to a commission, depends upon the circumstance whether there be an intention to resume the trading; which is a question for a jury. *Ex parte Paterson*, 1 Rose, 402. *Eden*, 5. If a man has carried on a manufactory, his ceasing actually to work it does not for that reason make him cease to be an object of the bankrupt laws, if he continues to solicit orders, and holds himself out to the world as capable of executing orders in the course of his trade, *Wharam v. Routledge*, 5 Esp. 236. And where a person was proved to have been a trader by buying and selling fish during one season, Lord Ellenborough said that it must be presumed he still carried on his business in the usual way, and continued a trader down to the time of his bankruptcy. *Heanny v. Birch*, 3 Camp. 233.; *Paul v. Dowling*, M. & M. 268. Where business had been carried on by one party in partnership with another, which partnership had been dissolved some years before, and no act of trading had been done for two or three years before the time when the petitioning creditor's debt accrued, but the concerns had not been ultimately wound up and part of the stock still remained in the warehouse of the parties undisposed of, the jury found, under the direction of the court, that the trading continued. *Executors of Backhouse v. Tarleton*, coram Lord Ellenborough C. J., 2 Stark. Ev. 143., 1st ed. An executor disposing of his testator's stock is not a trader, though he purchase other articles to make it marketable; but if he increases the stock, and continues to sell, he becomes a trader. *Ex parte Nutt*, 1 Atk. 102.; *Ex parte Garland*, 10 Ves. 120.; *Eden*, 5. Where a testator directs his trade to be carried on after his death, that part of his property only will be liable in case of bankruptcy, which he has directed to be embarked in the trade. *Thompson v. Andrews*, 1 M. & K. 116.

An illegal trading will support a commission. *Cobb v. Symonds*, 5 B. & A. 516. As the trading of a clergyman; *Ex parte Meymot*, 1 Atk. 196.; or of a smuggler. *S. C. ib.* 199.

Under the general statement in the commission that the bankrupt got his living by buying and selling, any species of trading may be given in evidence. *Hale v. Small*, 2 B. & B. 25. And where the bankrupts were described as "bankers, being traders according to the statute," it was held that the word "bankers" might be considered only a description of the person. *Bernasconi v. Farebrother*, 10 B. & C. 549.

Evidence of trading—what persons are within the particular words of 6 Geo. 4. c. 16. s. 6.] A pawnbroker is a "broker" within the statute. *Raulinson v. Pearson*, 5 B. & A. 124. So a shipbroker. *Pott v. Turner*,

6 Bing. 702. Whether an insurance broker be within the same term has not been determined; *Ex parte Stevens*, 4 Madd. 256.; *Pott v. Turner*, 6 Bing. 708.; it is, however, probable, that whenever it becomes necessary to determine the point, it will be resolved in the affirmative; see *Eden*, 7. In order to make a man a money scrivener, it must be an occupation to which he resorts in order to gain his living. In the course of this occupation he must receive other men's monies into his trust or custody. He must carry on the business of being trusted with other people's monies to lay out for them as occasion offers. *Adams v. Malkin*, 3 Camp. 534.; *Lott v. Melville*, 3 Scott, N. R. 346., S. C. 3 M. & G. 40. The keeper of a private lodging house, who buys provisions for his lodgers and charges a profit, is an "hotel-keeper" within the above section. *Smith v. Scott*, 9 Bing. 14.

Evidence of act of bankruptcy under stat. 6 Geo. 4. c. 16.] By this statute, sect. 3., it is enacted that, if any such trader shall depart the realm, — or being out of this realm shall remain abroad, — or depart from his dwelling-house, — or otherwise absent himself, — or begin to keep his house, — or suffer himself to be arrested for any debt not due, — or yield himself to prison, — or suffer himself to be outlawed, — or procure himself to be arrested, — or his goods, money, or chattels, to be attached, sequestrated, or taken in execution, — or make, or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, — or make, or cause to be made, any fraudulent surrender of any of his copyhold lands or tenements, — or make, or cause to be made, any fraudulent gift, delivery, or transfer of any of his goods or chattels, — every such trader, doing, suffering, procuring, executing, permitting, making or causing to be made, any of the acts, deeds, or matters aforesaid with intent to defeat or delay his creditors, shall be deemed to have thereby committed an act of bankruptcy.

By section 4., where any trader shall execute any conveyance or assignment by deed to a trustee of all his estate and effects for the benefit of all his creditors, the execution shall not be deemed an act of bankruptcy, unless a commission issue against him within six calendar months from the execution thereof by such trader; provided that such deed be executed by such trustee within fifteen days after the execution thereof by the trader, and that the execution by such trader and trustee be attested by an attorney or solicitor, and notice be given within two months after the execution thereof by such trader, in case such trader reside in London or within forty miles thereof, in the *London Gazette* and also in two London daily newspapers; and in case such trader does not reside within forty miles of London, then in the *Gazette*, and also in one London daily newspaper and one provincial newspaper published near to his residence; and such notice shall contain the date and execution of the deed, and the name and place of abode of every such trustee, and of such attorney or solicitor.

By section 5., if any such trader, having been arrested or committed to prison for debt, or on any attachment for non-payment of money, shall upon such, or any other arrest or commitment for debt, or non-payment of money, or upon any detention for debt, lie in prison for twenty-one days; or, having been arrested or committed to prison for any other cause, shall lie in prison for twenty-one days afte

any detainer for debt lodged against him and not discharged, he shall be deemed to have thereby committed an act of bankruptcy; or if any such trader, having been arrested or detained for debt, shall escape out of custody, he shall be deemed to have thereby committed an act of bankruptcy from the time of such arrest or detention.

By section 6., if any such trader shall file, in the office of the Lord Chancellor's secretary of bankrupts, a declaration in writing signed by him, and attested by an attorney or solicitor, that he is insolvent or unable to meet his engagements, the secretary, or his deputy shall sign a memorandum that such declaration hath been filed; which memorandum shall be authority for the printer of the *London Gazette* to insert an advertisement of such declaration therein; and every such declaration shall, after such advertisement inserted as aforesaid, be an act of bankruptcy committed by such trader at the time when such declaration was filed; but no commission shall issue thereupon unless it be sued out within two calendar months next after the insertion of such advertisement, and unless such advertisement shall have been inserted in the *London Gazette* within eight days after such declaration was filed. By the same section, the *Gazette* containing such advertisement shall be evidence of such declaration having been filed. And, by section 7., the declaration having been concerted between the bankrupt and any creditor, or other person, shall not invalidate the commission.

By section 8., a trader, after a docket struck against him, compounding with the person who struck the same, whereby such person may receive more in the pound than the other creditors, is guilty of an act of bankruptcy.

By section 10., a trader having privilege of parliament, not paying or compounding to the satisfaction of his creditor and also entering an appearance to the action within one month, is guilty of an act of bankruptcy. And, by section 11., a trader, having privilege of parliament, disobeying the order of any court of equity, or in bankruptcy, or lunacy, for payment of money after service and peremptory day fixed, is guilty of an act of bankruptcy.

With regard to all the acts enumerated in sect. 3., they must, in order to constitute acts of bankruptcy, be done with the intent to defeat or delay creditors; and this intention may be either inferred from the act itself, as a necessary consequence of it, or shown by other circumstances accompanying the act, or proved by the admissions or declarations of the bankrupt; and it has been decided that such declaration need not be contemporaneous, if it be so connected as to be part of the *res gesta*. *Rouch v. Great Western Railway Co.*, 1 Q. B. 51.

The act must be within twelve calendar months before the fiat; 5 & 6 Vict. c. 122. s. 7.; and by the same statute, sect. 8., an act concerted between the bankrupt and his creditor, or other person, will support a fiat.

The most important decisions with regard to the above acts of bankruptcy will now be noticed.

Evidence of act of bankruptcy — departing the realm.] It must be shown that the trader departed the realm *with intent* to delay his creditors; and therefore, though the creditors be in fact delayed, yet if the intent is wanting, there is no act of bankruptcy. *Warner v. Barber*,

Holl, N. P. C. 175. ; *Windham v. Paterson*, 1 *Stark.* 145. But where the departing the realm must necessarily cause a delay, it will be an act of bankruptcy ; for a person must be supposed to foresee and intend the necessary consequence of his own acts. *Ramsbottom v. Lewis*, 1 *Camp.* 280. Therefore where a trader went abroad in consequence of having killed his wife, it was held an act of bankruptcy. *Woodier's case*, *B. N. P.* 39. ; and see *Raikes v. Portau*, *Vernon v. Hankey, Co. B. L.* 111. Where a trader departed the realm leaving a letter behind him, and on the following day wrote another letter from Calais, it was held that both letters were admissible to show with what intention he departed. *Rawson v. Haigh*, 2 *Bing.* 99. ; *Ridley v. Gyde*, 9 *Bing.* 349. Going to Ireland is a departing the realm. *Williams v. Nunn*, 1 *Taunt.* 270.

Evidence of act of bankruptcy — departing from his dwelling-house.] Notwithstanding a decision to the contrary in *Barnard v. Vaughan*, 8 *T. R.* 149., it is now settled that actual delay need not be proved ; an intent to delay is sufficient. *Robertson v. Liddell*, 9 *East*, 487. Even where a trader departed under a mistaken idea that an officer, who called, had a writ for him, it was held an act of bankruptcy. *Ex parte Bamford*, 15 *Ves.* 449. Where the act of departing is equivocal, it is a question for the jury whether it was with intent to delay creditors ; as where two partners left their shop, stating their purpose to be to get some bills discounted, and telling their shopman, if any creditor called, to make an excuse. In this case the jury found the intent ; no evidence being given of an intent to discount the bills. *Deffe v. Desanges*, 8 *Taunt.* 671. ; *Aldridge v. Ireland*, cited 1 *Taunt.* 273. A trader who has no settled house or counting-house, but takes up a temporary abode at a public-house in the place to which his business carries him, commits an act of bankruptcy by departing from such public-house with intent to delay his creditors. *Holroyd v. Gwynne*, 2 *Taunt.* 176.

In order to prove the intent with which the bankrupt departed from his dwelling-house, evidence of what he said is admissible as part of the *res gesta*. *Ambrose v. Clendon*, *Hardw.* 267. There are many cases to shew that the declaration ought to be one made at the time of the act, or, at all events, so near it as to form part of one and the same transaction. But it has been more recently held that, though concurrence of time is material to shew the connection between the act done and the expressed intention, it is not essential. *Rouch v. Great Western Railway Co.*, 1 *Q. B.* 51. Thus the declarations of the bankrupt after his return home, as to the reason of his absence, have been admitted ; *Baleman v. Bailey*, 5 *T. R.* 512. ; *Ridley v. Gyde*, 9 *Bing.* 349. ; or before leaving his home ; *Smith v. Cramer*, 1 *New Ca.* 585. The declaration of the bankrupt that he departed to avoid a writ is evidence of an act of bankruptcy, without proof of the writ, the debt, or even the existence of creditors. *Newman v. Stretch, M. & M.* 338. ; accord. *Rouch v. Great Western Railway Co.*, *supra*, p. 538.

Evidence of act of bankruptcy — otherwise absenting himself.] It has been held sufficient evidence of the trader absenting himself to shew that, after being arrested, he fled from the officer into the house of another person, where the door was fastened, and the officer not permitted to enter ; and that he said he remained there for fear of other

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creditors. *Bayly v. Schofield*, 1 M. & S. 338. So where the trader went into the back shop of a neighbour's house to avoid an officer, who, he said, had a writ against him. *Chenoweth v. Hay*, *Id.* 676.; and see *Wilson v. Norman*, 1 Esp. 334. And again, where a trader left his counting-house, to which he never returned, taking away his books with him, and went to his country-house where he slept two or three nights afterwards, he was held to have committed an act of bankruptcy. *Judine v. Da Cossen*, 1 New Rep. 234. So where there were two partners, one of whom resided in Manchester and the other in London, and the London partner having left his house without intent to delay his creditors, and having been a few days on a visit at Manchester, both of them left their counting-house there to avoid an arrest, carrying with them their books of accounts; this was held an act of bankruptcy. *Spencer v. Billing*, 3 Camp. 312. And where a trader abstained from going to a place to make an inquiry as to an execution against him, to which he would have gone but for fear of an arrest, this was held to be "an absenting himself." *Robson v. Rolls*, 9 Bing. 648. According to the decisions "absenting himself" has hitherto been confined to the case of a party absenting himself from his own regular place of business at which a man would be expected to be, or from one or more particular creditors at some other place. *Per Curiam Bernasconi v. Farebrother*, 10 B. & C. 556. It has been said that no case has yet gone the length of deciding that, where the appointment is to meet the creditor at his (the creditor's) place of residence, and the debtor breaks that appointment, such conduct amounts to an act of bankruptcy. *Per Parke J., Lees v. Marton*, 1 M. & Rob. 212.; but see *Robson v. Rolls*, 9 Bing. 648., *Bernasconi v. Farebrother*, 10 B. & C. 556. Where a trader, who was in the habit of attending the Royal Exchange, left it on seeing one of his creditors whom he had appointed to meet there, desiring a friend to say he was not there, it was held an act of bankruptcy. *Gillingham v. Laing*, 6 Taunt. 532. But where a trader who, on being arrested, had obtained his liberty upon a promise to attend and execute a bail-bond, did not attend, it was held not an act of bankruptcy. *Schooling v. Lee*, 3 Stark. 149. With regard to a mere failure to keep an appointment with a creditor, the authorities do not agree; in *Tucker v. Jones*, 2 Bing. 2.; S. C., 9 B. Moore, 24., the court of Common Pleas considering it not an act of bankruptcy; while in *Robinson v. Carrington*, 1 Mont. & Ayr. 12., the Master of the Rolls expressing a contrary opinion. It is in fact a question depending on intention. See *Ex parte Lavender*, 2 M. & A. 11. And a failure to keep appointments to settle with creditors at specified times and places, with intent to delay payment, was held to be clearly an act of bankruptcy in *Russell v. Bell*, 10 M. & W. 340. Where the trader was informed by the attorney of the petitioning creditor that he had delivered a warrant to arrest him to an officer, and was advised by him to repair to his office to avoid a public arrest, which the trader did, it was held no act of bankruptcy. *Mills v. Elton*, 3 Price, 142. It is immaterial whether a creditor was actually delayed or not. *Chenoweth v. Hay*, 1 M. & S. 676.

Evidence of act of bankruptcy—begin to keep his house.] It was formerly thought that in order to prove a beginning to keep house, with intent to delay creditors, an actual denial of a creditor must be proved;

Garret v. Moule, 5 T. R. 575. ; but it is now settled that such actual denial is only one mode of proof by which the act of bankruptcy may be established, and that it may be proved by any evidence to the same effect. Thus where a trader withdraws from his counting-house on the ground floor to his parlour up stairs for privacy and seclusion, and with a view to avoid the fair importunity and personal solicitation of his creditors, it is an act of bankruptcy. *Dudley v. Vaughan*, 1 Camp. 271. ; and see *R. v. Bebb*, cited 1 M. & S. 354. ; *Lloyd v. Heathcote*, 2 B. & B. 388. ; *Key v. Shaw*, 8 Bing. 321. Where the partners in a banking-house reside in the same place in which the bank is situated, and they close the windows and shutters of the bank during hours of business, this is "a beginning to keep house." *Cumming v. Baily*, 6 Bing. 363. But it is not an act of bankruptcy in those partners who are not resident in the same place. *Mills v. Bennett*, 2 M. & S. 556. ; *Ex parte Mavor*, 19 Ves. 543. ; *Hawkins v. Whitten*, 10 B. & C. 217. A mere direction given by a trader to deny him is not an act of bankruptcy, unless that direction be followed by an actual denial, or by his concealing himself, or by some other act which is evidence of a beginning to keep house. *Fisher v. Boucher*, 10 B. & C. 705. And where a trader, having been arrested on the 20th of May, desired his servants not to let into the house any person whom they did not know, and, on the morning of the 21st, the doors of the house were kept shut, and no person was admitted without it being ascertained who he was, it was held an act of bankruptcy, though no creditor was actually denied. *Harvey v. Ramsbottom*, 1 B. & C. 55. If a trader secretes himself in the house of a friend where he is lodging, and where persons are in the habit of calling upon him, it is an act of bankruptcy. *Curteis v. Willes*, R. & M. 58. ; *S. C.* 4 D. & R. 224. And though the trader was seen by the creditor at the time of the denial, it is still an act of bankruptcy. *Ex parte Bamford*, 15 Ves. 451. Where a trader gives a general order to be denied, and is denied to a particular creditor, it is such a beginning to keep house as will constitute an act of bankruptcy, though the trader immediately overtakes the creditor, and tells him he is not afraid of him but of another creditor. *Mucklow v. May*, 1 Taunt. 479. ; and see *Colkett v. Freeman*, 2 T. R. 59. It must be proved that the order to deny was given by the trader. *Dudley v. Vaughan*, 1 Camp. 271. ; *Ex parte Foster*, 17 Ves. 416. But if a trader in his own house hears himself denied to a creditor, and does not come forward, this, if done with an intent to delay creditors, is an act of bankruptcy, though he has given no directions to be denied. *Smith v. Moon*, M. & M. 458.

In answer to this general evidence of denial it may be shown that the order was not given with intent to delay ; as that it was to deny the trader to any one who should come whilst he was at dinner, or engaged in business. *Shew v. Thomson*, Holt, N. P. C., 159. ; *Lloyd v. Heathcote*, 2 B. & B. 392. A simple denial to a creditor is not enough to make a trader a bankrupt ; he may order himself to be denied at unreasonable hours, as at night, and on other occasions which may be easily imagined, without meaning to delay the creditor, and therefore without committing an act of bankruptcy. *Per Lord Ellenborough C. J.*, *Smith v. Currie*, 3 Camp. 350. ; *Ex parte Preston*, 2 V. & B. 312. But where a trader ordered his servant to say, if any creditors called, that he was not at home, and he was accordingly denied, being ill in bed

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at the time, it was held that it was properly left to the jury whether this was an act of bankruptcy, and that they were warranted in finding it so; the creditor should have been informed that the trader was at home but ill. *Lazarus v. Walthman*, 5 B. Moore, 313.

Evidence of act of bankruptcy—fraudulent conveyance, &c.] By the 6 Geo. 4. (sec. 3.) two descriptions of fraudulent transactions are made acts of bankruptcy, viz. any fraudulent grant or conveyance of any of the trader's lands, tenements, goods, or chattels, and also any fraudulent gift, delivery, or transfer, of any of his goods or chattels. A bill of exchange is a chattel within the above section. *Cumming v. Bailly*, 6 Bing. 363. A fraudulent delivery of goods will not be an act of bankruptcy, unless it is in the nature of a gift or transfer; so that where goods are removed with intent to delay a creditor, but the party in whose custody they are placed has no claim given to him over them, this is not an act of bankruptcy. *Cotton v. James, M. & M.* 273. As the acts which have heretofore been determined to be fraudulent preferences will, under the latter of these provisions, be henceforth considered as acts of bankruptcy, and as the doctrine relating to fraudulent preference by deed applies likewise to all fraudulent preferences, it will be most convenient to consider them together. *Eden*, 25. It should be observed that a creditor who has executed, or been privy to, or acted under, the fraudulent deed, cannot set it up as an act of bankruptcy. *Bamford v. Baron*, 2 T. R. 594. (n.); *Jackson v. Irvin*, 2 Camp. 49.; *Tope v. Hockin*, 7 B. & C. 101.

Evidence of act of bankruptcy—fraudulent conveyance, &c.—deeds fraudulent at common law or under stat. 13 Eliz. c. 5.] A grant or conveyance may be void either under the statute 13 Eliz. c. 5., or at common law, or as being contrary to the policy of the bankrupt laws. The facts necessary to be proved in order to establish fraud, so as to avoid a deed at common law, will be stated hereafter; see *post*, tit. *Actions against Sheriffs*.

Evidence of act of bankruptcy—fraudulent conveyance, against the policy of the bankrupt law.] The cases formerly decided relative to assignments by deed of all a trader's property, will now, under the latter of the clauses above mentioned, be applicable to all assignments, whether under seal or not. The assignment of all a trader's property, whether upon trust for the benefit of one creditor, *Wilson v. Day*, 2 Burr. 827., or of several, *Compton v. Bedford*, 1 W. Bl. 362., or of all to the exclusion of one, *Ex parte Foord*, cited 1 Burr. 477., is an act of bankruptcy, except under the circumstances mentioned in sect. 4. of the act 6 Geo. 4. c. 16., *antè*, p. 532. And it is immaterial that in fact the trader has no intent to delay or defeat his creditors. *Stewart v. Moody*, 1 C. M. & R. 777. Where a trader conveyed the whole of his property to a creditor upon trust to satisfy his debt and to pay over the surplus, if any, to the trader, who then knew himself to be insolvent, it was held an act of bankruptcy, and that such conveyance was invalid, though the bill of sale was given by the trader, when under arrest, at the suit of the particular creditor for a just debt. *Newton v. Chantler*, 7 East, 138. So where A., a trader, conveyed all his effects (of which he remained in possession) as a security to B., a banker, who

had agreed to honour his drafts, subject to a defeasance on A.'s paying such sums as B. advanced, with a covenant that, on A.'s default, B. should take possession of the effects, the conveyance was held fraudulent. *Worseley v. Demattos*, 1 Burr. 467. So where a trader, in distressed circumstances, assigned all his estate to a creditor as a security for an unliquidated sum, without delivering possession, the assignment was held fraudulent. *Wilson v. Day*, 2 Burr. 827. In the two last cases the assignment appears to have been fraudulent on three grounds: 1. As an undue preference of the particular creditor in contemplation of bankruptcy; 2. As contrary to the policy of the bankrupt law, being an assignment of *all* the trader's property, whereby he was disabled from carrying on his trade; and, 3. At common law; the want of transfer of the possession being evidence of the fraud.

An assignment of all a trader's effects, or of all but a colourable exception, even upon trust for the benefit of all his creditors, is an act of bankruptcy, on the ground, first, that the trader necessarily deprives himself, by such an act, of the power of carrying on his trade; and, secondly, that he endeavours to put his property under a course of application and distribution among his creditors different from that which would take place under the bankrupt law. *Dutton v. Morrison*, 17 Ves. 199.; *Compton v. Bedford*, 1 W. Bl. 363. But such an assignment is now protected under certain conditions by sect. 4. of the act 6 Geo. 4. c. 16. Such assignment is an act of bankruptcy, though none of the creditors have executed it, and though it has never been acted upon, or out of the trader's possession. *Botcherby v. Lancaster*, 1 A. & E. 77. And in general an assignment of so much of a man's stock as disables him from carrying on his business is an act of bankruptcy. *Hooper v. Smith*, 1 W. Bl. 442. But it is incumbent on the party, who sets up the act of bankruptcy, to show that the assignment will have the effect of preventing the trader from carrying on his business by giving evidence of the general state of his affairs at the time. It is not sufficient to prove that, under pecuniary pressure, he parted with some articles essential to the carrying on of his business; as where a miller transferred his waggon and horses to a creditor who had arrested him. *Wedge v. Newlyn*, 4 B. & Ad. 831.

But a distinction is to be observed between an assignment by a trader of all his effects for the benefit of his creditors, or for securing a pre-existing debt, and an assignment of all his property for a valuable consideration; the latter not being fraudulent. Thus it is said by Lord Kenyon, that all the cases, where the assignment of his property by a trader had been deemed fraudulent and an act of bankruptcy, had been where it had been given for a by-gone and pre-contracted debt; but that it never could be taken to be law that a trader could not sell his property when his affairs became embarrassed, or assign them to a person who would assist him in his difficulties, as a security for any advances such person might make to him. *Whitwell v. Thompson*, 1 Esp. 72.; and see *Manton v. Moore*, 7 T. R. 67.; *Hunt v. Mortimer*, 10 B. & C. 44. So it has been held that a sale to a *bonâ fide* purchaser of the whole of a trader's stock in trade, the trader intending to abscond with the money and to defraud his creditors, is not an act of bankruptcy; for the trader receives in return a fund of great value, which is available for the benefit of his creditors. *Barter v. Pritchard*, 1 A. & E. 456.; *Harwood*

v. Bartlett, 6 *New Ca.* 61. An assignment by a trader to a creditor of all his effects and stock in trade is of itself an act of bankruptcy, and the question of fraud should not be left to the jury. *Siebert v. Spooner*, 1 *M. & W.* 714.

An assignment of *part* of a trader's effects to a particular creditor (unlike, in this respect, to an assignment of the whole,) carries with it no intrinsic evidence of fraud; a trader must in the course of his business have the power to make over parts of his property either for past debts or for future advances. Thus it has been held that an assignment of part of a trader's property upon trust to sell and dispose of the proceeds as he shall direct, is not, in itself, an act of bankruptcy. *Robinson v. Carrington*, 1 *Mont. & Ayr.* 1.; and it is *prima facie* lawful. *Chase v. Goble*, 2 *M. & G.* 930. A trader, entitled to large freehold and leasehold estates, but greatly embarrassed, and having committed acts of bankruptcy, conveyed his freehold and leasehold estates to trustees upon trust to sell or mortgage, and to apply the produce as he should direct. It appearing that the trust deed was executed under advice for the purpose of effecting a conversion of the trader's property with a view to an arrangement with his creditors, to which he was himself considered incompetent from the state of his health, it was held, that the trust deed was not an act of bankruptcy. *Greenwood v. Churchill*, 1 *Mylne & K.* 546.; and see *Carr v. Burdiss*, 1 *C. M. & R.* 443.; *Abbott v. Burbage*, 2 *New Ca.* 444.

But when an assignment is made in contemplation of bankruptcy, and consequently with the intent to give the creditor a preference over the other creditors, it is contrary to the spirit and policy of the bankrupt law, and is not only void, but, whether it be by deed (as formerly), or by gift, delivery, or transfer of goods and chattels, is an act of bankruptcy. *Eden*, 32. A transfer of goods in satisfaction of a *bona fide* debt, made voluntarily and in contemplation of bankruptcy, is an act of bankruptcy, and is not protected by the sect. 81. of 6 Geo. 4. c. 16., though made more than two months before a commission issues. *Bevan v. Nunn*, 9 *Bing.* 107. In one case it appears to have been the opinion of the court, that a deed voluntarily executed by a trader in order to give a preference to particular persons to the prejudice of his general creditors, was fraudulent and an act of bankruptcy, although not made in contemplation of bankruptcy. *Pulling v. Tucker*, 4 *B. & A.* 382. But it has since been held that, in order to render the conveyance of part of the bankrupt's effects fraudulent, something more than mere voluntariness is necessary; as contemplation of bankruptcy; see *Gibbins v. Philipps*, 7 *B. & C.* 529.; *Morgan v. Brundrett*, 5 *B. & Ad.* 289. In order to constitute an act of bankruptcy, the conveyance must be both fraudulent and in delay of creditors; and contemplation of bankruptcy is evidence of fraud. Bayley J., in *Gibbins v. Philipps*, *supra*. Whether the party contemplated bankruptcy is a question for the jury under all the circumstances of the case. *Poland v. Glyn*, 4 *Bing.* 22. (n.); *Flook v. Jones*, 4 *Bing.* 20. An assignment by an insolvent is void if made with the intention of petitioning the court for his discharge, though made more than three months before the commencement of the imprisonment. *Becke v. Smith*, 2 *M. & W.* 191. And an assignment may be fraudulent without contemplation of bankruptcy. *Cook v. Caldecott*, *M. & M.* 522.

Proof that a trader is in embarrassed circumstances is not conclusive evidence that he contemplated bankruptcy. *A.*, a trader, purchased goods from *B.* on the 8th Oct. for exportation, but finding that he must stop payment, and that he could not apply them to the purpose for which they were bought, he returned them on the 16th Oct. to *B.*, and on the 17th stopped payment, though expecting remittances from abroad more than sufficient to pay his debts, and though he had no doubt that his creditors would give him time. They, however, refusing, he was made bankrupt on the 2d Nov. Under these circumstances it was held, that the jury were warranted in finding that the delivery of the goods was not made in contemplation of bankruptcy. *Fidgeon v. Sharp*, 1 *Marsh*. 196.; and see *Wheelwright v. Jackson*, 5 *Taunt.* 109., *Moore v. Barthrop*, 1 *B. & C.* 5. To make out a case of fraudulent preference the actual bankruptcy must have been contemplated; the trader's knowledge that he was in a state of insolvency is not sufficient. *Atkinson v. Brindall*, 2 *New Ca.* 225. But see *Porter v. Walker*, 1 *M. & G.* 686.

In order to constitute a fraudulent preference, the transaction on the part of the trader must be voluntary. If the assignment or transfer be upon the importunity of a creditor, the transaction will be valid, and it is immaterial whether the trader had or had not an act of bankruptcy in contemplation at the time the creditor pressed for payment or security, and thereby obtained such payment or security. *Hartshorn v. Slodden*, 2 *B. & P.* 582.; *Crosby v. Crouch*, 11 *East*, 261.; *Belcher v. Jones*, 2 *M. & W.* 258. Nor will it render such a transaction fraudulent that it was conducted under circumstances of secrecy. If the creditor was entitled to demand and to receive a security in goods for a running debt, upon what principle is he obliged to insist upon the transaction being conducted by his debtor with any particular circumstances of publicity, which might be, in other respects, injurious to the general credit of such debtor? *Per Lord Ellenborough, C. J.*, *Crosby v. Crouch*, 11 *East*, 261. If a trader gives a preference to a creditor under an apprehension, however groundless, of legal process, such preference is valid. *Thompson v. Freeman*, 1 *T. R.* 155. And where a creditor, knowing his debtor to be in distressed circumstances and not able to pay his debts, applied to him for a security, and took part of his stock in trade for that purpose, it was held no undue preference, though the creditor did not threaten a suit in case of refusal. *Smith v. Payne*, 6 *T. R.* 152. So where *A.*, a shopkeeper, procured *B.* to discount accommodation bills drawn by him and accepted by third persons, and *B.* afterwards required *A.* to give him a collateral security for the payment of the bills, upon which *A.* secretly deposited with him a quantity of goods from his shop to be sold for *B.*'s benefit, if the bills should not be paid; and soon after *A.* became a bankrupt, and the bills were dishonoured; it was held that the depositing of the goods in this manner as a security was not a preference in contemplation of bankruptcy. *Crosby v. Crouch*, 2 *Camp.* 166.; *S. C.* 11 *East*, 256. The consideration upon which a payment, made to an importunate creditor of a debt actually due, has been allowed to be valid, has not been that he might resort to a suit to enforce payment, but that his demand repels the presumption that the bankrupt, upon the eve of bankruptcy, made a distinction among his creditors, and spontaneously favoured one of them to the prejudice of the rest. A demand of further security for a debt

not yet due has the same effect, and in neither case is there any fraud upon the bankrupt laws, on which ground alone transactions previous to the bankruptcy can be set aside. *Per* Lord Ellenborough C. J., *ibid.* Again, where a trader, at the instance of his creditor, gave goods out of his shop in part payment of a bond not then due, the transaction was held valid. *Hartshorn v. Slodden*, 2 B. & P. 582.; *Crosby v. Crouch*, 11 East, 260. And where a trader, without solicitation and in contemplation of stopping payment, put three cheques into the hands of his clerk, to be delivered to a creditor at the counting-house of the latter, but, before the delivery, the creditor called upon the trader and demanded payment of his debt, it was ruled that, the intention of making a voluntary preference not having been consummated, the payment stood good. *Bayley v. Ballard*, 1 Camp. 416.; but see *Singleton v. Butler*, 2 B. & P. 283. *post*, and *Cook v. Rogers*, 7 Bing. 446., where *Bayley v. Ballard* is doubted. A debtor, being insolvent and in prison, went under a day rule to receive a sum of money due to him from an office; a creditor met him there and demanded and received, out of the money, payment of his debt, having no notice of the debtor's insolvency and imprisonment. Eight days afterwards a commission issued against the debtor. It was held that this was no fraudulent preference. *Churchill v. Crease*, 5 Bing. 177. A trader had property to a considerable amount standing in the Custom House in his own name, but in fact purchased on account of A. A bill deposited with A. by the trader, as a security, appearing to be a forgery, A. insisted upon having the property transferred to himself, which was done on the 14th and 15th of January. On the 17th the trader became bankrupt. Lord Ellenborough said that the question for the jury was, whether the transfer was voluntary, or made under the apprehension that a degree of force, civil or criminal, was about to be applied. *De Tastet v. Carroll*, 1 Stark. 88.; and see *Atkins v. Seward*, *Manning's Index*, 62, 63. In these cases the length of time elapsing between the transaction and the bankruptcy, is a material consideration, and, with regard to the contemplation of bankruptcy the question is not what was the real state of the trader's affairs, but what was its state in his own judgment. *Belcher v. Prittie*, 10 Bing. 408.

But where a trader, being pressed by a creditor for payment or security, gave a bill of sale of certain wools and cloths in a mill apparently the whole of his stock, and immediately left his business and home and became bankrupt, it was held that, inasmuch as the act done did not redeem the trader even from any present difficulty, which is the ordinary motive for such an act when really done under the pressure of a threat, it was evidence that it was not done under such a pressure, but voluntarily, and with a view to prefer the particular creditor in contemplation of bankruptcy. *Thornton v. Hargreaves*, 7 East, 544. The acceptor of a bill of exchange, two days before the expiration of the time for which the bill was originally drawn, called upon the indorser, and informed him privately that he was insolvent: the indorser insisted on being paid the amount of the bill, offering at the same time to become security to the creditors for so much as the estate should produce; whereupon the acceptor paid it, and four days after became bankrupt. It appeared also, that the bill had been altered so as to make it fall due before this transaction, but without the indorser's knowledge. These circumstances were held to afford evidence of a fraudulent preference. *Singleton v.*

Butler, 2 B. & P. 283. See *Bayley v. Ballard*, 1 Camp. 416., *supra*. Where a trader, being pressed, conveyed estates in trust to sell and pay the pressing creditor, with a further trust to pay debts to certain relatives, it was held a preference in contemplation of bankruptcy. *Morgan v. Horseman*, 3 Taunt. 241. If evidence of a threat is given to shew that the transaction was not a voluntary one on the part of the bankrupt, it is still matter of consideration for the jury whether that threat had any operation or not, and the motives of the trader may be properly inquired into. *Cook v. Rogers*, 7 Bing. 438. Where a payment is clearly made in contemplation of bankruptcy, and voluntarily, the question whether it be a fraudulent preference becomes a matter of law rather than of fact. *Semb. Gibson v. Muskett*, 4 M. & G. 160.

The declarations of the trader connected with the fraudulent assignment are evidence towards establishing the act of bankruptcy. *Ridley v. Gyde*, 9 Bing. 349. To prove that goods had been fraudulently given to certain creditors by the bankrupt, the plaintiff tendered evidence that they had, since the fiat, returned them to the assignees: Held inadmissible; for it only amounted to the expression of an opinion by them that they were not entitled. *Backhouse v. Jones*, 6 New Ca. 65.

Evidence of act of bankruptcy—lying in prison.] This act of bankruptcy, under sect. 5. of 6 Geo. 4. c. 16., does not relate to the first day of the imprisonment. *Higgins v. M'Adam*, 3 Y. & J. 1.; *Moer v. Newman*, 6 Bing. 556. In order to render a lying in prison twenty-one days an act of bankruptcy, the arrest must be for a subsisting legal debt. *Eden*, 35. A penalty due to the crown has been considered a sufficient debt. *Cobb v. Symonds*, 5 B. & A. 516. The time of lying in prison commences from the first arrest, the day of arrest being included. *Glassington v. Rawkins*, 3 East, 407. Where bail is put in, and the defendant surrenders in discharge of his bail, the time is computed from the surrender; *Tribe v. Webber*, Willes, 464.; but where the bankrupt was arrested in Kent on the 31st of March, and on the 8th of May brought by *habeas corpus* to be bailed, and on the road to the judge's chambers was permitted to call at his attorney's house, which was out of the county of Kent, whence he was carried directly to a judge's chambers, to be bailed, and was bailed accordingly, and immediately surrendered by the bail, it was held, that the act of bankruptcy had relation to the 31st March. *Rose v. Green*, 1 Burr. 437. If the defendant is suffered to go at large after the arrest, and afterwards returns into custody, the time is computed from the return. *Barnard v. Palmer*, 1 Camp. 509. Where the defendant at the time of the arrest was sick, and consequently suffered to remain some time in his own house, the key of which was kept by the officer's follower not named in the warrant, the time was held to run from the arrest. *Stevens v. Jackson*, 4 Camp. 164.; S. C. 6 Taunt. 106. And so where the party has the benefit of day rules during the period. *Soames v. Watts*, 1 C. & P. 400. If a commission (or fiat) issues before the time expires, it cannot be supported, though it would be no objection that the requisite time had not expired when the docket was struck. *Gordon v. Wilkinson*, 8 T. R. 507.; *Wydown's case*, 14 Ves. 80.

The arrest may be proved by an examined copy of the writ, and return of *cepi corpus*, or by proof of the writ, the warrant, and the

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arrest; see *antè*, pp. 75. 388. The fact of lying for twenty-one days in prison may be proved by the production of the prison books. *Salte v. Thomas*, 3 B. & P. 188. The cause of the commitment may be proved by production of the *committitur*. *Ibid*.

Evidence of act of bankruptcy — filing petition to take the benefit of the insolvent act.] This act of bankruptcy is introduced in the insolvent acts, of which the latest is 1 & 2 Vict. c. 110. s. 39. The filing of the petition is not, however, to be an act of bankruptcy, unless the party be declared bankrupt before the time advertised in the *Gazette* for hearing the petition, or within two calendar months from the filing of it; within which time it will have the effect of avoiding the assignment under the insolvent act. The filing of the petition is not complete till it reaches its final destination in the proper office. *Garlick v. Sangster*, 9 Bing. 46. An office copy of the petition under the seal of the Insolvent Court is made evidence by sect. 105. of the same act.

Evidence of act of bankruptcy — filing an affidavit of debt.] By 1 & 2 Vict. c. 110. sect. 8., for abolishing arrest on mesne process, a creditor may make his debtor a bankrupt (if a trader) by filing an affidavit of debt in a court of bankruptcy, and by serving him personally with a copy, and with a written notice demanding immediate payment. If the trader does not pay, secure, or compound for the debt within twenty-one days after such service, or enter into a bond approved of by the commissioner to pay such sum and costs as shall be recovered in an action, or render himself into custody in the court in which the action is brought, such trader shall be deemed to have committed an act of bankruptcy on the 22d day, provided a fiat issues within two calendar months after filing the affidavit.

Similar acts of bankruptcy have been introduced into 5 & 6 Vict. c. 122. (see next head); but it has been considered that the former provisions are not repealed by those of the latter act. *Ex parte Cheese*, 12 Law Journ., N. S. 33.

Evidence of act of bankruptcy — under 5 & 6 Vict. c. 122.] By sect. 11, 12, & 13. of this act, if the creditor of a trader files an affidavit of debt in any bankruptcy court after an account delivered and a notice demanding immediate payment, the debtor is summoned to appear; upon appearance he is required to make a written admission of the debt, or an affidavit that he has a good defence; if he refuses to do either, or to appear, and does not, within fourteen days after personal service of the summons, pay, secure, or compound to the satisfaction of the creditor, or execute a bond to pay the sum, with costs, to be recovered in an action for the debt, he shall be deemed to have committed an act of bankruptcy on the fifteenth day, provided a fiat shall issue within two months after filing the affidavit.

By sect. 14., if the debtor upon such summons admits the debt, and does not pay, tender, secure, or compound for it as above within fourteen days, this also is an act of bankruptcy on the fifteenth day, provided the fiat issues within two months. A like provision is made by sect. 15., where the debtor admits part only of the debt.

By sect. 20. nonpayment of a judgment debt within fourteen days after personal service of a notice demanding payment is an act of

bankruptcy on the fifteenth day, unless execution is restrained by the court.

By sect. 21. nonpayment of money under the decree of any court of equity, or any order in bankruptcy or lunacy, after a peremptory day fixed by the court and personal service of such peremptory order, is an act of bankruptcy on the fifteenth day after the service.

By sect. 22. an act of bankruptcy may be by filing a declaration of insolvency by the trader in the office of the secretary of bankrupts, signed by him and attested by an attorney or solicitor; provided a fiat issues within two months; and a copy, purporting to be certified by the secretary or his clerk as a true copy, shall be received as evidence of such declaration having been filed. This provision simplifies, and, in effect, supersedes the declaration of insolvency under the corresponding provision contained in 6 Geo. 4. c. 16. s. 6., *anté*, p. 533.

Evidence of the fiat, and the appointment of assignees, &c.] Before the 2 & 3 Wm. 4. c. 114. the proof of commissions and other proceedings in bankruptcy was regulated by 6 Geo. 4. c. 16. ss. 96. & 97.; but by the 2 & 3 Wm. 4. c. 114., reciting that those enactments had been found defective, and that no provision had been made in the 1 & 2 Wm. 4. c. 56. for entering of record fiats and other proceedings not prosecuted in the court of bankruptcy, it is enacted (section 1.) that the records of all commissions of bankrupt, and of all proceedings under the same, which may have been theretofore entered of record pursuant to 6 Geo. 4. c. 16., or any other act, shall be removed into the court of bankruptcy, and shall be kept as records of that court, &c.; provided always (section 2.) that all commissions issued before 1st of September, 1825, and all depositions and other proceedings relating to such commissions directed to be enrolled and actually entered of record upon or since that day, shall be deemed and taken to have been well and effectually entered of record. And by section 3., the certificate of such entry, purporting to be signed by the person appointed to enter such proceedings or by his deputy, shall have the same effect as if such commission had been issued after the 1st September, 1825, and shall be received in evidence without proof of the appointment or handwriting of such person.

By section 5., all fiats already issued or thereafter to be issued, in lieu of commissions, to be prosecuted elsewhere than in the court of bankruptcy, and all adjudications, and all appointments of assignees and certificates of conformity made and allowed under such fiats, may and shall be entered of record in the said court of bankruptcy, upon the application of or on behalf of any person interested therein.

By section 8., no fiat issued or to be issued in lieu of a commission, whether prosecuted in the court of bankruptcy or elsewhere, nor any adjudication of bankruptcy, or appointment of assignees, or certificate of conformity under such fiat, shall be received in evidence in any court of law or equity, unless the same shall have been first entered of record in the court of bankruptcy as aforesaid.

And by section 9., upon the production in evidence of any commission, fiat, adjudication, assignment, appointment of assignees, certificate, deposition, or other proceeding in bankruptcy, purporting to be sealed with the seal of the said court of bankruptcy, or of any writing purporting to be a copy of any such document, and to be sealed as afore-

said, the same shall be received as evidence of such documents respectively, and of the same having been entered of record without any further proof; provided, that all fiats and proceedings under it which may have been entered of record before the passing of this act, shall upon production with the certificate thereon purporting to be signed by the person appointed to enter proceedings in bankruptcy, or his deputy, be received as evidence of the same having been duly entered of record.

In cases before the 1 & 2 Wm. 4. c. 56., the assignment was proved by production of the deed with the certificate of enrolment and evidence of the execution by the commissioners; but by the general practice of the courts it was admitted, unless notice to dispute it had been given. *Tucker v. Barrow*, M. & M. 137. This practice, however, was mere matter of courtesy, and if the objection was taken, the execution of the instrument must have been proved. *Gomersall v. Serle*, 2 Y. & J. 5.

The law with regard to the proof of the assignment, and of the deed of bargain and sale to the commissioners, is entirely altered by 1 & 2 Wm. 4. c. 56., by which the necessity for those instruments is done away, and the property is made to vest directly in the assignees. By this act, section 25., when any person has been adjudged a bankrupt, all his personal estate, present and future, which by the laws then in force might be assigned by commissioners, shall become absolutely vested in the assignees for the time being by virtue of their appointment, without any deed of assignment; and as often as any such assignee shall die, or be removed, and a new assignee appointed, all such personal estate, then vested in the deceased or removed assignee, shall vest in the new assignee, either alone or jointly with the existing assignees, as the case may require. And by section 26., all present and future real estate of such bankrupt, whether in the United Kingdom or in any of the dominions belonging to His Majesty, theretofore assignable by the commissioners to the assignees, shall vest in such assignees for the time being by virtue of their appointment, without any deed of conveyance for that purpose, and as often as any such assignee or assignees shall die, or be lawfully removed or displaced, and a new assignee or assignees shall be duly appointed, such of the aforesaid real estate as shall remain unsold or unconveyed shall, by virtue of such appointment, vest in the new assignee or assignees either alone or jointly with the existing assignees, as the case may require, without any conveyance for that purpose.

In cases where a conveyance of the property of a bankrupt would require to be registered, the certificate of the appointment of the assignees shall be registered; sect. 27.

Strict proof of title — when dispensed with by statute.] By 6 G. 4. c. 16. s. 92., if the bankrupt shall not (if he was within the United Kingdom at the issuing of the commission) within two calendar months after the adjudication, or (if out of the United Kingdom) within twelve calendar months after the adjudication, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions taken before the commissioners, at the time of or previous to the adjudication, of the petitioning creditor's debt, the trading and act of bankruptcy shall be conclusive evidence of the matters therein respectively contained in all actions at law or suits

in equity brought by the assignees for any debt, or demand, for which the bankrupt might have sustained any action.

Where there are some counts on causes of action on which the bankrupt might have sued, and others on which he could not, the proceedings under the commission are evidence, if the plaintiffs elect to proceed only on those counts which the bankrupt might have sustained. *Jones v. Fort, M. & M.* 196. Where the bankrupt might have sued if he had not become bankrupt; as where property was deposited with the defendant for a special purpose, and converted by him in breach of the bailment, the depositions will be conclusive evidence, though the conversion took place after the act of bankruptcy. *For v. Mahoney, 2 C. & J.* 325. The plaintiffs declared as assignees, in trover, laying the possession, in one count, in the bankrupt and the conversion in their own time, and, in the other, both the possession and conversion in their own time. The action (as it appeared by the statement of counsel) was to recover the value of goods, sold for cash by the bankrupt to a creditor, who, it was alleged, intended to retain the amount in fraud of the contract. It was held, that although the record did not show that the bankrupt might himself have maintained an action, yet as that appeared to be the case from the state of facts, the depositions were conclusive evidence within the 92d section. *Kitchener v. Power, 3 A. & E.* 232. The above section does not apply to commissions anterior to the act. *Kay v. Goodwin, 6 Bing.* 576.

It seems doubtful how far the above section is affected by the 1 & 2 Wm. 4. c. 56. s. 17., which authorises the bankrupt to dispute the adjudication by petition to the Court of Review, which may grant an issue for trying the validity of the adjudication; and if the verdict or adjudication shall not be set aside, such verdict or adjudication shall, as against the bankrupt, the petitioning creditor, and any assignee, and all persons claiming under the assignees, and all persons indebted to the bankrupt's estate, be conclusive evidence that the party was or was not a bankrupt at the date of such adjudication.

Where the assignees unnecessarily went into evidence of the trading (in consequence of a notice to dispute), without adverting to the provisions of 6 Geo. 4. c. 16. s. 92., and, having failed to establish the trading, were nonsuited, the court refused to set the nonsuit aside. *Johnson v. Piper, 2 Nev. & M.* 672.

By the term *conclusive evidence* in the 92d section of the 6 Geo. 4., it must be understood that no evidence is to be admitted to contradict the depositions. *Eden*, 370. But if the depositions do not, upon the face of them, prove a debt, trading, or act of bankruptcy respectively, the assignees will not be entitled to recover. *Id.* 371., 3d edit. Thus, where the deposition states a debt due from the bankrupt as drawer of a bill of exchange, but does not state any presentment to the acceptor, the deposition will not be evidence of the debt. *Cooper v. Mackin, 1 Bing.* 426.; *Lawson v. Robinson, 1 Stark.* 456.; *Marsh v. Meager, ibid.* 353. But where the petitioning creditor's debt is proved by the deposition, it is not competent for the defendant to shew that the debt was a fraudulent contrivance between the bankrupt and the petitioning creditor. *Young v. Timmins, 1 C. & J.* 148. It is only in actions or suits brought by the bankrupt's own assignees for a debt or demand for which he might have sued, that the depositions are made evidence; and therefore if the assignees of another bankrupt are petitioning creditors,

and notice of disputing the petitioning creditor's debt is given, the depositions under the latter commission are not made evidence by this section. *Muskett v. Drummond*, 10 B. & C. 153. See *Skaije v. Howard*, 2 B. & C. 860. But it seems that trover lies for goods deposited by the bankrupt, though the proof of conversion is a demand by, and refusal to, the assignees, on which demand the bankrupt himself could not have sued. *Alsager v. Close*, 10 M. & W. 576.

By 2 & 3 Wm. 4. c. 114. s. 7., in the event of the death of any of the witnesses deposing to the petitioning creditor's debt, trading, or act of bankruptcy, under any commission or fiat already issued or thereafter to be issued, it shall be lawful for the assignees, and all persons claiming through or under them, or acting by or under their authority, in the cases hereafter mentioned, to produce and read in evidence in all courts of civil judicature, and in all civil proceedings, in support of such commission or fiat, any deposition of such deceased witness relative to the petitioning creditor's debt, trading, or act of bankruptcy, which shall have been duly entered of record; and the production or reading of such depositions, or of any copy duly authenticated according to the provisions of that or the previous acts, shall have the same effect as if the matters alleged therein had been deposed to by the same witness in such court according to the ordinary course and practice thereof; provided always that the depositions shall be read in evidence in such cases only when the party using the same shall claim, maintain, or defend some right, title, interest, claim, or demand which the bankrupt might have claimed, maintained, or defended in case no commission of bankruptcy or fiat had issued.

By 5 & 6 Vict. c. 122. s. 24., if the bankrupt shall not (if he was within the United Kingdom at the date of the adjudication) within twenty-one days after the advertisement of the bankruptcy in the *Gazette*, or (if in any other part of Europe at the same date) within three months after such advertisement, or (if elsewhere at the same date) within twelve months after such advertisement, have commenced an action, suit, or other proceeding to dispute or annul the fiat, and shall not have prosecuted the same with due diligence and with effect, the *Gazette* containing such advertisement shall be conclusive evidence in all cases as against such bankrupt, and in all actions at law or suits in equity brought by the assignees for any debt or demand for which such bankrupt might have sustained any action or suit had he not been adjudged bankrupt, that such person became a bankrupt before the date and suing forth of such fiat, and that such fiat was sued forth on the day on which the same is stated in the *Gazette* to bear date; saving all rights which shall have accrued to any such person previous to the commencement of this act, and in respect of which any proceedings shall be pending at the time of the commencement of this act, which shall be adjudged and determined as if this act had not been passed.

This section does not apply to adjudications before the 11th November, 1842. *Edwards v. Sherren*, 11 M. & W. 595.

By sect. 25., in the event of the death of any witness deposing to the petitioning creditor's debt, trading, or act of bankruptcy under any fiat in bankruptcy already issued or hereafter to be issued, the deposition of any such deceased witness, purporting to be sealed with the seal of the court of bankruptcy, or a copy thereof purporting to be so sealed,

shall in all cases be receivable in evidence of the matters therein respectively contained.

Where the assignees are strangers to the record, and their title comes in incidentally, it must be strictly proved in the regular manner. *Doe v. Liston*, 4 Taunt. 741. But if they are parties to the record, though not named assignees, the proceedings will be sufficient evidence, unless notice has been given; if the other party is aware that they make title under the commission. *Simmonds v. Knight*, 3 Camp. 2511.; *Rowe v. Lant, Gow*, 24. So, though there are other defendants on the record, if these defendants have justified as servants of the assignees. *Gilman v. Cousins*, 2 Stark. 182.

Proof of title — notice of intention to dispute.] By 6 Geo. 4. c. 16. s. 90., it is enacted, that in any action by or against any assignee, or in any action against any commissioner or person acting under the warrant of the commissioners, for any thing done as such commissioner, or under such warrant, no proof shall be required, at the trial, of the petitioning creditor's debt, or of the trading, or act of bankruptcy respectively, unless the other party in such action shall, if defendant, at or before pleading, and if plaintiff, before issue joined, give notice in writing to such assignee, commissioner, or other person, that he intends to dispute some and which of such matters; and in case such notice shall have been given, the judge may (if he thinks fit) certify that the matter has been proved or admitted; which shall entitle the party to costs.

The judge, on the reference of a cause before trial, cannot certify, *Barthrop v. Anderton*, 8 Bing. 268. Nor does the statute apply to an issue on interpleader to try the title of the assignees as against an execution creditor. *Lott v. Melville*, 3 M. & G. 40. But an action of ejectment in which the assignees are lessors of the plaintiff is within this section, and it applies to assignees under commissions issued before the statute; *Doe v. Liversedge*, 11 M. & W. 517.; and to an action by a bankrupt against his assignees. *Ex parte Dick*, 1 Rose, 41.

Notice to dispute "the bankruptcy" is too general. It must specify which of the three matters, trading, petitioning creditor's debt, and act of bankruptcy, is intended to be disputed. *Trinley v. Unwin*, 6 B. & C. 537. Under this section no proof whatever of the petitioning creditor's debt, trading, or act of bankruptcy, is required, unless proper notice has been given; although the plea denies the bankruptcy. *Moon v. Raphael*, 7 C. & P. 115. Where, in an action by a bankrupt against his assignees, no notice having been given by the former of disputing his bankruptcy, the assignees unnecessarily put in the proceedings under the commission, and an objection was taken to the petitioning creditor's debt apparent on the face of the deposition, it was held that such an objection could not be sustained. *M'Beath v. Coates*, 12 B. Moore, 122., misreported in 4 Bingh. 34.; *Bevan v. Lewis*, 1 Simons, 376. Where the bankrupt was within the United Kingdom at the time of the issuing of the commission, and has given no notice to dispute the commission, the effect of the above clause is that, in cases where the bankrupt, if solvent, could have sued, and the defendant gives notice of his intention to dispute the bankruptcy, &c., the fact so disputed must be proved; but the depositions under the commission are conclusive evidence of the matters contained in them. *Earlth v. Schroder*, M. & M. 26.; *Eden*, 370. In

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assumpsit by assignees for money had and received after the bankruptcy, the defendant denied that the plaintiffs were assignees and gave a notice to dispute the act of bankruptcy only: held that, after proof of an act, of bankruptcy before the receipt of the money, the plaintiffs need go further and show that there was a trading and petitioning creditor's debt coexistent with such act. *Porter v. Walker*, 1 M. & G. 686.

Where notice has been given only to dispute the act of bankruptcy, and the other side have read the depositions on the file to prove the trading and debt, the residue of the proceedings are not considered to be in evidence, and the counsel of the party contesting the commission has no right to inspect them. *Bluck v. Thorne*, 4 Camp. 191.; *Stafford v. Clarke*, 1 C. & P. 26.

The notice is no part of the defendant's evidence, but may be proved at the commencement of the plaintiff's case, and will immediately put him upon proof. *Decharme v. Lane*, 2 Camp. 324.

Proof of title — service of notice to dispute, &c.] A notice served by delivering it to a clerk at the defendant's counting-house before issue joined, without showing that it has come to the defendant's hands, has been held rightly served. *Widger v. Browning*, M. & M. 27. If no notice has been delivered with the plea, and the plea is got back under a false pretence and re-delivered with a notice, it is insufficient. *Lawrence v. Crowder*, 1 Moore & P. 511.; S. C., 3 C. & P. 229. Service on the attorney is sufficient. *Howard v. Ramsbottom*, 3 Taunt. 526.

Strict proof of title — when dispensed with by admission.] Strict proof of the title of the assignees has been dispensed with in cases where the defendant's conduct has been an express or implied admission of their title. *Eden*, 354.; *Maltby v. Christie*, 1 Esp. 340.; *Rankin v. Horner*, 16 East, 191. Thus, where the defendant had attended a meeting of the commissioners and exhibited an account between him and the bankrupt, and afterwards made a part payment to the assignee on that account, it was held to be *prima facie* evidence that the plaintiff was assignee. *Dickinson v. Coward*, 1 B. & A. 677. So where the defendant, on being applied to by the assignee, said he would call and pay the money, this was held to dispense with the usual proofs of the assignee's title. *Pope v. Monk*, 2 C. & P. 112. Such an admission is evidence even when the title is directly in issue. *Inglis v. Spence*, 1 C. M. & R. 432. The affidavit of a witness, used by the petitioning creditor to prove the act of bankruptcy, is evidence against him of such act and of the time of it. *Gardner v. Moult*, 10 A. & E. 464.

In some cases the conduct of the party is conclusive evidence of the title of the assignees. Thus where the bankrupt obtained his discharge under 49 Geo. 3. c. 121. on the ground of his bankruptcy, it was held he could not deny it in an action against his assignees. *Watson v. Wace*, 5 B. & C. 153. So an affidavit by the petitioning creditor that a party is indebted to the deponent in the sum of 100*l.* and upwards, and is become bankrupt, is, as against the deponent, conclusive evidence of the bankruptcy. *Ledbetter v. Salt*, 4 Bing. 623. But a party against whom a commission has issued is not estopped from disputing it merely because he has applied to a commissioner to appoint an official assignee to investigate the sufficiency of the debt. *Munk v. Clark*, 2 New Ca. 299.

In trespass the defendants justified taking goods as assignees of M.;

the plaintiff denied that the goods were the goods of the defendants as assignees; held that the bankruptcy and assignment were admitted on these pleadings. *Jones v. Brown*, 1 New Cas. 464.

Evidence with regard to the title of assignees under joint and separate commissions, &c.] Where separate fiats have been issued against several persons, and the same persons are appointed assignees under each, they may describe themselves as assignees of those bankrupts generally, and may give evidence of a joint demand due to all the bankrupts. *Scott v. Franklin*, 15 East, 428.; *Streatfield v. Halliday*, 3 T. R. 779.; 2 Saund. 47, o (n). But in such action they cannot recover also for separate demands due to each of the bankrupts. *Hancock v. Haywood*, 3 T. R. 433. And where there are separate fiats against several partners, and different assignees under each fiat, in declaring for a joint debt the assignees must not describe themselves as joint assignees, but as assignees of each bankrupt respectively. *Ray v. Davies*, 8 Taunt. 134.; *S. C.*, 2 B. Moore, 3. The assignees under a joint fiat against A. and B., in suing on a separate contract made with A., may describe themselves generally as the assignees of A., without noticing B. *Stonhouse v. Da Silva*, 3 Camp. 399.; *Harvey v. Morgan*, 2 Stark. 17. And the assignees under a joint fiat against two partners may recover in the same action debts due to the partners jointly, and debts due to them separately. *Graham v. Mulcaster*, 4 Bing. 115. But assignees under a joint fiat against A. and B., who have committed acts of bankruptcy at different times, cannot recover money received by the defendant between the acts of bankruptcy, either as money had and received to the use of the bankrupts, or to the use of the assignees. *Hogg v. Bridges*, 8 Taunt. 200. Where the assignees of two partners declared in trover upon the possession of the bankrupts, and it appeared in evidence that the greater part of the goods in question belonged to one of the partners only before the commencement of the partnership, and had never been brought into the partnership fund, and that the residue formed part of the joint estate, Lord Kenyon held that the plaintiffs could recover the residue only; whereas, if there had been a count on the possession of the assignees, as it was a joint commission and the assignment under such commission passes both joint and separate effects, the whole might have been recovered. *Cock v. Tunno*, Scher. N. P. 1316.; and see 2 Saund. 47, o (n).

Where the appointment of an assignee is vacated by the chancellor and a new assignee is appointed, the latter is assignee by relation, and may sue in his own name as assignee on a contract made by the former assignee. *Aldritt v. Kettridge*, 1 Bing. 355.

Evidence in particular actions by assignees of bankrupts.] In many transactions between the bankrupt and others after an act of bankruptcy committed, the assignees have the option either of adopting the contract made by the bankrupt and suing the party in an action of assumpsit, or of disaffirming the contract and suing him for damages in an action of trover. They cannot, however, disaffirm the transaction, if it appears that they have once affirmed it. *Brewer v. Sparrow*, 7 B. & C. 310. Therefore, where assignees had recovered a sum of money from the bankrupt's banker, which had been received by him and the amount of which had been paid over to a creditor of the bank-

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rupt, with a knowledge of the bankruptcy, it was held that they could not sue the creditor who had received it; for, having disaffirmed the banker's acts in the former action, they could not in the present suit affirm them as payments of the bankrupt's money. *Vernon v. Hanson*, 2 T. R. 287. So where the bankrupt, before his bankruptcy, had purchased goods on credit and re-sold them fraudulently at under-prices, it was ruled that assumpsit for goods sold and delivered could not be maintained by the assignees against the purchaser to recover the difference in value; for that would be both to affirm and disaffirm the contract. *Burra v. Clarke*, 4 Camp. 355. Money had and received has been held to be maintainable against a person, who after taking the goods of the bankrupt in execution after an act of bankruptcy, has taken them under a bill of sale from the sheriff. *Reed v. James*, 1 Stark. 134. And where a bankrupt, after an act of bankruptcy, contracted with a factor, to whom he had delivered goods for sale and who had accepted a bill upon the strength of the goods, to return the goods, if he would return the bill, and did return the bill, it was ruled that the assignees might adopt this contract and recover against the factor for the non-delivery of the goods. *Butler v. Carver*, 2 Stark. 433.

Where the goods of the bankrupt have been converted by the defendant either before or after the bankruptcy, the assignees may recover their value in an action of trover. Where there has been a tortious taking since the bankruptcy, such taking is a sufficient conversion; but where there has been a collusive sale of the goods by the trader in contemplation of bankruptcy, there will be no conversion without evidence of a demand and refusal. *Nixon v. Jenkins*, 2 H. Bl. 135., *ante*, p. 513. In some cases, although trover will lie, yet it is necessary to bring assumpsit in order to recover substantial damages. Thus, where after his bankruptcy the bankrupt drew a check in favour of one of his creditors upon his bankers, who paid the check, it was held that the assignees could not recover the amount of the money in trover against the creditor, but only the value of the paper. *Mathew v. Sherwell*, 2 Taunt. 439.; and see *Walker v. Laing*, 7 Taunt. 568. A sheriff who seizes and sells the goods of the bankrupt after an act of bankruptcy committed, is liable in trover, although he had no notice of the act of bankruptcy. *Potter v. Starkie*, cited 4 M. & S. 260.; *Garland v. Carlisle*, 10 Bing. 452., S. C. 4 Moore & P. 24. Confirmed by the House of Lords, 4 New Ca. 7.; S. C., 3 M. & W. 152. But the law is now altered, see *post*, 2 & 3 Vict. c. 99.

Evidence in particular actions—as to reputed ownership.] By 6 Geo. 4. c. 16. s. 72., if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was the reputed owner, or whereof he had taken upon him the sale, alteration, or disposition, as owner, the commissioners shall have power to sell the same for the benefit of the creditors.

All personal goods and chattels are within the statute, as ships; *Stephens v. Sole*, cited 1 Ves. 352.; *Ex parte Burn*, 1 J. & W. 378.; utensils of trade; *Lingard v. Messiter*, 1 B. & C. 308.; *Sinclair v. Stevenson*, 2 Bing. 514.; unless such utensils are let, and there is a usage of trade for the utensils to be so let; *Horn v. Baker*, 9 East, 215. 239. So stock; *Ex parte Richardson*, Buck. 480.; bills of exchange; *Horn-*

blower v. Proud, 2 B. & A. 327.; policies of insurance; *Fulkner v. Case*, 1 Br. C. C. 125.; shares in a public company; *Nelson v. London Ass. Co.*, 2 S. & S. 292.; *Ex parte Valance*, 3 Mon. & A. 224.; and in a newspaper; *Longman v. Tripp*, 2 New Rep. 67.; have been held to be within the statute.

In order to bring the case within the statute, the assignees should, in general, give some evidence beyond that of mere possession. Where the bankrupt has once been the owner of the property in question, the mere fact of possession may, it is said, raise a presumption that he continues in possession as reputed owner; but where the bankrupt has never been the real owner, possession may not, of itself, be sufficient to show him to be reputed owner, and it would then be necessary for the assignees to establish that fact by other evidence; *Lingard v. Measiter*, 1 B. & C. 308.; and reputed ownership is a question of fact for the jury; *Edwards v. Scott*, 1 M. & G. 962. Where it appears that, in some instances, articles used in collieries belong to the tenants, and that in others they do not; that, though in some cases the landlord, in demising collieries, permits the lessee, on certain conditions, to have the use of such articles during the demise; in other instances they belong absolutely to the lessee; then, if the possession of such things is consistent with the fact of a person being absolute owner, and also of his not being such owner, the mere possession of them ought not to raise an inference that the person in possession is the owner. *Per Abbott, C. J.*, *Storer v. Hunter*, 3 B. & C. 376.; see *Fairburn v. Eastwood*, 6 M. & W. 679. A notorious custom in the coal trade to paint the name of the mere hirer of a barge upon it, will prevent a barge so hired by a coal-merchant from passing to his assignees. *Watson v. Peache*, 1 New Ca. 327. In order to prove the bankrupt reputed owner, evidence of reputation is admissible; *Oliver v. Bartlett*, 1 B. & B. 269.; and on the other hand, evidence of a contrary reputation is admissible for the defendant; *Gurr v. Rutton, Holt, N. P. C. 327*. Thus, evidence of the bankrupt being in possession of furniture, &c., under an agreement which was notorious in the neighbourhood, was held to take the case out of the statute. *Muller v. Moss*, 1 M. & S. 335.

Evidence of reputed ownership "at the time he becomes bankrupt."] Goods which have come to the possession of the bankrupt after the act of bankruptcy are not within the statute. *Lyon v. Weldon*, 2 Bing. 334. So, if the goods are taken out of the possession of the bankrupt before the act of bankruptcy, they will not pass to the assignees. Thus, where the purchaser of goods, lying at a wharf, received a delivery order from the seller, but suffered them to remain in the name of the seller for several months, during which time the seller disposed of a part, till, upon notice of the seller's insolvency, the purchaser had the goods transferred into his own name nine days before the seller's bankruptcy, it was held that the goods did not pass under the statute. *Jones v. Dwyer*, 15 East, 21. So where the purchaser took possession the day before the bankruptcy. *Arbouin v. Williams*, R. & M. 72.; but see *Darby v. Smith*, 8 T. R. 82.; *Jones v. Dwyer*, 15 East, 26. It was held by Lord Gifford *at nisi prius*, that a removal on the same day, but before the act of bankruptcy, would not take the case out of the statute. *Arbouin v. Williams*, R. & M. 72. A demand by the owner of the goods before the

act of bankruptcy is sufficient to take them out of the order and disposition of the bankrupt. *Smith v. Topping*, 5 B. & Ad. 674.

Evidence of reputed ownership — “by consent and permission of the true owner.”] The property of infants, who cannot consent, is not within the statute. *Viner v. Cadell*, 3 Esp. 88. So stock, transferred by the accountant-general into the name of the mortgagor without the privity of the mortgagee, will not pass to the assignees of the mortgagor. *Ex parte Richardson*, Buck. 480. The goods of a woman married to and living with an insolvent as his wife, he having a former wife living, do not pass to his assignees (although such goods were in his possession) if she was ignorant of the former marriage. But if she has allowed him the control and management of her property after discovery of the former marriage, such property passes to the assignees. *Miller v. Demetz*, 1 M. & Rob. 479. Where a trustee sold and let the purchaser into possession before payment, the case was held to be within the statute; for by the “true owner,” the legal owner is intended. *Ex parte Dale*, Buck. 365.

It is not sufficient to show that the goods were in the order and disposition of the bankrupt with the consent of a person who was permitted by the true owner to deal with them as his own; but the consent must move directly from the true owner to the bankrupt. *Fraser v. Swansea Canal Co.*, 1 A. & E. 354.

Evidence of reputed ownership — “have in his possession, order, or disposition.”] Where a warrant was directed to a trader’s servant and another person, as special bailiffs, who took possession of the goods in the shop, but the business, without the trader’s interference, was carried on apparently as usual, it was held that the possession of the servant was the possession of the master, and that the case was within the statute. *Jackson v. Irvin*, 2 Camp. 48.; *Toussaint v. Hartop*, Holl. N. P. C. 335.; and see *Doker v. Hasler*, 2 Bing. 479. Where a trader gave a creditor an order to receive a certain sum of money in the hands of A., whom he directed to transmit it to the creditor, and whilst the money was in the hands of the carrier, the trader became bankrupt, Lord Ellenborough was of opinion, that while the money was in the hands of the carrier the property remained unaltered, and that the case was within the statute. *Hervey v. Liddiard*, 1 Stark. 123. But the possession of a pawnee is not the possession of the bankrupt pawnor, so as to bring the goods pawned within the statute. *Greening v. Clark*, 4 B. & C. 316. Where the goods were by agreement left in the vendor’s possession, but the purchaser marked them with his initials, they were held to be within the statute. *Knowles v. Horsfall*, 5 B. & A. 134.; *Lingard v. Messier*, 1 B. & C. 308. But, where wine sold by the bankrupt was for the purchaser’s convenience bottled and deposited in the bankrupt’s cellar, set apart in a particular bin, marked with the purchaser’s seal, and entered in the bankrupt’s books as belonging to the purchaser, it was held not to be within the statute. *Ex parte Marrable*, 1 G. & J. 402.; *Caruthers v. Payne*, 5 Bing. 270. So where A. deposited with B., as a security, certain warrants of the West India Dock Company for sugars deposited in their warehouses and entered in his name in their books, and the company assented to the transfer, and A. afterwards became

a bankrupt, it was held that the sugars did not pass to A.'s assignees; as the transfer of the warrants was a complete transfer of the possession before the bankruptcy. *Lucas v. Dorrien*, 1 B. Moore, 29. So wines in the London Docks, which pass by the indorsement of the warrants, are not in the order and disposition of the bankrupt, unless he has the warrants in his possession. *Ex parte Davenport*, Mont. & Bligh, 165. If a symbolical delivery only can be made, it is sufficient to take the case out of the statute. *Manton v. Moore*, 7 T. R. 67.; *Mair v. Glennie*, 4 M. & S. 240.; *Brown v. Heathcote*, 1 Atk. 160. Where a person entitled to take out letters of administration neglected to do so, but remained in possession of the goods of the intestate and became bankrupt, the case was held within the statute. *Fox v. Fisher*, 3 B. & A. 135. A., a dyer, having purchased a plant of B., resold it to him, and B. never took actual possession, but demised it to A. for three years, during which time A. became bankrupt; the plant was held to pass to his assignees. *Bryson v. Wylie*, 1 B. & P. 83. (a.) So where a creditor purchased under a bill of sale from the sheriff certain machinery of his debtor taken in execution at his suit, and, having marked them with his initials, demised them to his debtor, it was held that, as the change of ownership was not notorious, the machinery passed to the assignees of the debtor. *Lingard v. Messiter*, 1 B. & C. 308.; see *Storer v. Hunter*, 3 B. & C. 368.; *Horn v. Baker*, 9 East, 215.; *Lingham v. Biggs*, 1 B. & P. 82.; *Clark v. Crownshaw*, 3 B. & Ad. 804. Where a testator directed, in case his son should carry on his trade, that his lease and furniture should not be sold, but that his trustees should permit his widow and children to reside in his dwelling-house, and have the use of the furniture, it was held that the furniture did not pass to the assignees of the mother and son, who had carried on the trade. *Ex parte Martin*, 2 Rose, 331. So of furniture left to trustees to be enjoyed with the mansion-house and not to be removed without the leave of the trustees. *Earl of Shaftesbury v. Russell*, 1 B. & C. 666. And where household furniture and stock, in pursuance of an agreement for sale of a dwelling-house and the household furniture and stock therein, were left in the dwelling-house in the possession of the seller for three months after the sale, they were held not to be in his order and disposition on his becoming bankrupt within the three months; the sale being notorious in the neighbourhood. *Muller v. Moss*, 1 M. & S. 335.

But where a house was let with a covenant to determine the lease on the lessee committing an act of bankruptcy, and by another deed the furniture of the house was demised subject to a similar covenant, it was held that the furniture passed to the assignees of the lessee, who had become bankrupt; the jury having found that he was the reputed owner of the furniture. *Hickenbotham v. Groves*, 2 C. & P. 492.

Evidence of reputed ownership — goods sent on sale or return.] Goods sent upon sale or return to a trader are within his possession, order, and disposition, and pass to his assignees. *Livesey v. Hood*, 2 Camp. 83. And where there was a custom that the purchasers of hops should leave them in the vendor's warehouse for the purposes of sale, undistinguished from his other stock, they were held to pass to his assignees. *Thackthwaite v. Cock*, 3 Taunt. 487. But where goods, sent on sale or return if not approved of, arrived only the day before the trader's bankruptcy, they were held not to pass to his assignees; for he should have been

allowed a reasonable time to select such goods as he was disposed to retain. *Gibson v. Bray*, 8 Taunt. 76.

Evidence of reputed ownership — goods belonging to feme covert.] Goods belonging to a woman living with the trader as his wife, and asserting herself to be his wife, will pass to his assignees. *Mace v. Cadell*, Cowp. 232. But where, on marriage, goods are vested in trustees for the separate use of the wife, in order to enable her to carry on a separate trade, and the husband lives with her, if he do not intermeddle with them and there be no fraud, such effects will not pass to the assignees of the husband; but whether the trade be carried on solely by the wife, or jointly with the husband, is a question of fact for the jury; and if they determine the latter, the effects will pass to the assignees. *Jarman v. Woodlton*, 3 T. R. 616. See also *Dean v. Brown*, 5 B. & C. 336.; *Miller v. Demetz*, 1 M. & Rob. 479.; *anté*, p. 553.

Evidence of reputed ownership — in case of partners.] It was held in one case that the share of a dormant partner is not within the statute, the ostensible partner having become bankrupt; *Coldwell v. Gregory*, 1 Price, 119.; but this case has been much doubted; *Ex parte Dyster*, 2 Rose, 256., and may be considered as overruled by the following decision. A. and B. were partners, but the whole business was carried on by, and in the name of, A., B. not appearing to the world as a partner. At the dissolution of the partnership all the joint stock and effects were left, by agreement, in the hands of A., who was to receive and pay all the debts due to and from the concern. After carrying on the business for a year and a half, A. became bankrupt. It was held that the partnership property passed to his assignees. *Ex parte Enderby*, 2 B. & C. 389. 406.; and see *Ex parte Barrow*, 2 Rose, 252.

Evidence of reputed ownership — ships.] A ship, registered in the name of one partner, but suffered to be in the possession, order, and disposition of the partnership, will pass under the assignment of the joint estate. *Ex parte Burn*, 1 J. & W. 378. Upon the sale or mortgage of a ship at sea, the transfer being symbolical by delivery of the grand bill of sale, upon the return of the ship the transfer will be invalid, if the purchaser, after notice, neglects to take possession or notify the transfer to the captain. *Mair v. Glennie*, 4 M. & S. 240.; *Richardson v. Campbell*, 5 B. & A. 196. And by 4 Geo. 4. c. 41. s. 44., where any transfer of any ship or vessel, or any share thereof, shall have been made as a security for the payment of any debt, either by way of mortgage or of any assignment to a trustee, for the purpose of selling for the payment of any debt, if such transfer shall have been duly registered according to the provisions of the act, the interest of the mortgagee shall not be affected by the bankruptcy of the mortgagor, notwithstanding that the ship was at the time in the possession, order, and disposition of the bankrupt, and that he was reputed owner. *Robinson v. Macdonnell*, 5 M. & S. 228.; *Kirkley v. Hodgson*, 1 B. & C. 586. And see similar clauses in the later registry acts.

Evidence of reputed ownership — debts, &c.] Where a simple contract debt is assigned, the assignor is considered as having the order and dis-

position of the debt with the consent of the true owner until the debtor has notice of the assignment. *Buck v. Lee*, 1 A. & E. 804. *Gibson v. Overbury*, 7 M. & W. 561. When the freight to be earned by a ship is assigned, and notice given to the party who is to pay it, the freight is no longer in the order and disposition of the assignor. *Douglas v. Russell*, 4 Sim. 524.; 1 Mylne & K. 488.

Evidence of reputed ownership — fixtures.] Whether fixtures will pass to the assignees of a bankrupt, as being in his order and disposition, has been the subject of many decisions. In the following cases they were held not to pass. The lessee of land, having erected a distillery thereon, demised the same to persons who became bankrupt: Held that the stills, &c., being fixed to the freehold, did not pass to the assignees. *Horn v. Baker*, 9 East, 215. L. took a lease of a mill and iron-forge, and purchased the fixtures and movable utensils from the landlord. He afterwards mortgaged them, and became bankrupt. The case was held to be governed by the preceding decision. *Clark v. Crownshaw*, 3 B. & Ad. 804. A steam-engine was erected at the joint expense of landlord and tenant for the purpose of working a colliery, to be used by the tenant during the term, but to be held as the property of the landlord, subject to such use. The court held this case not to be within the statute. *Coombs v. Beaumont*, 5 B. & Ad. 72. In the last case, Parke J. observed, that there was no distinction between fixtures removable as between landlord and tenant, and fixtures not so removable. The tenant in fee simple of a cotton mill, which contained a steam-engine, boilers, &c., mortgaged those articles, but remained in possession till his bankruptcy. The plate of the engine (which formed no part of the working apparatus) was fixed to the freehold of the mill. Every other part of the machine was secured by bolts and screws, and might be removed without injury to the building. It was held that the steam-engine, &c., were not in the order and disposition of the mortgagor at the time of his bankruptcy. *Hubbard v. Bagshaw*, 4 Simons, 326. A trader mortgaged premises, on which were a steam-engine and other fixtures erected for the purposes of trade; having become bankrupt while continuing possession, the court of Review held this not to be a case of reputed ownership. *Ex parte Lloyd*, 1 Mont. & Ayr. 494.; *Ex parte Wilson*, 2 Mont. & Ayr. 61.; *Ex parte Belcher*, 2 Mont. & Ayr. 160. In the above cases the courts appear to have proceeded on the ground that fixtures cannot be considered as "goods and chattels" within the meaning of the statute.

In one case the court of Exchequer seems to have thought that fixtures would pass to assignees, on the ground of their being personal property. *Trappes v. Harter*, 2 C. & M. 153.; *S. C.* 3 Tyrwh. 603. But this decision must be regarded as overruled (so far as the above principle is concerned) by the latter case of *Boydell v. M^r Michael*, 1 C. M. & R. 177. See also *Pim v. Grazebrook*, 3 M. & G. 865.

Evidence of reputed ownership — in the bankrupt's possession as executor.] Goods of a testator or intestate, in the possession of the bankrupt as executor or administrator, are not within the statute. *Ex parte Ellis*, 1 Atk. 101.; *Farr v. Newman*, 4 T. R. 629. So where the wife of the bankrupt is executrix. *Viner v. Cadell*, 3 Esp. 88. And

even money, if it can be specifically distinguished, will not pass to the assignees. *Per* Lord Mansfield C. J., *Howard v. Jemmett*, 3 Burr. 1369.; *Taylor v. Plumer*, 3 M. & S. 578.; *Fox v. Fisher*, 3 B. & A. 135.

Evidence of reputed ownership — in the bankrupt's possession as factor.] Goods in the bankrupt's possession as factor will not pass to his assignees. *B. N. P.* 42.; *Per* Lord Mansfield, in *Mace v. Cadell*, *Cowp.* 232. If the factor has sold the goods and received the proceeds before the bankruptcy, the principal must come in with the rest of the creditors and prove; *Scott v. Surman*, *Willes*, 400.; but if the factor takes notes in payment, *ibid.*, or exchanges the original goods for other goods, *Whitecomb v. Jacob*, 1 Salk. 160., the notes or goods are the property of the principal, and do not pass to the assignees. *Taylor v. Plumer*, 3 M. & S. 562. And if the goods have been sold, and the price has not been paid before the bankruptcy of the factor, and the assignees receive the money, the principal may sue them. *Scott v. Surman*, *Willes*, 400.

Evidence of reputed ownership — in the bankrupt's possession for a particular purpose.] Where goods are in the bankrupt's possession for a particular purpose, they do not pass, under the statute, to his assignees. Thus bills deposited by a customer with his banker, and entered as cash (whether indorsed by the customer or not), for the purpose of obtaining payment, which by the London bankers are usually entered short, (that is, not carried to the customer's credit as cash till paid,) do not pass to the assignees of the banker on his becoming bankrupt. *Giles v. Perkins*, 9 East, 12.; *Ex parte Serjeant*, 1 Rose, 153. And even where the bills are not entered short, but are treated as cash, they do not generally pass to the assignees. A customer was in the habit of indorsing and paying into his banker's hands bills not due, which, if approved, were immediately entered (as bills) to his credit, to the full amount, and he was then at liberty to draw for that amount by checks on the bank. The customer was charged interest upon all cash payments to him from the time when made, and upon all payments by bills from the time when they were due and paid, and had credit for interest upon cash paid into the bank from the time of the payment, and upon bills paid in from the time when the amount of them was received. The bankers paid away such bills to their customers as they thought fit. The bankers having become bankrupt, it was held that the bills paid in by the customer, and remaining in specie in the banker's hands, did not pass to the assignees; the cash balance, independently of the bills, being in favour of the customer at the time of the bankruptcy. *Thompson v. Giles*, 2 B. & C. 422. See *Ex parte Armistead*, 2 G. & J. 371., and *Ex parte Thompson*, *Mont. & Mac.* 108. (n.) Bills of exchange were paid by a customer to his account with a banker, and entered as cash, with a distinct interest account. The customer had credit to the amount of the bills so entered, but in fact never overdrawed the account. There was evidence of a custom in the country to circulate short bills, but no express authority was given by the customer to the banker to circulate the bills in question. It was held by the Lord Chancellor, reversing an order of the Vice-chancellor, that on the bankruptcy of the banker these bills

did not pass to his assignees. *Ex parte Benson, Mont. & Bligh*, 120. But where bills are not remitted for a particular purpose, but to be discounted; and they are discounted accordingly; they pass to the assignees. *Carstairs v. Bates*, 3 Camp. 301.; *Thompson v. Giles*, 2 B. & C. 432. So where bills are sent by one trader to another trader on a general running account; *Bent v. Puller*, 5 T. R. 494.; or where there is an exchange of bills for bills. *Hornblower v. Proud*, 2 B. & A. 327.; *Parke v. Eliason*, 1 East, 554.

A. and B. agreed that B. should purchase of A. the light gold coin which he should send, at a stated price, and that A. should from time to time draw upon B. for the money due upon such sale, and that B. should also from time to time accept other bills drawn by A. for his own convenience, for which A. was to remit value: after they had acted under this contract for some time, B. became a bankrupt, being under acceptances to a large amount; and A., not knowing of the bankruptcy, sent a quantity of light gold and bills to enable B. to discharge the acceptances, which parcel was taken to B.'s assignees. It was held that A., who had since paid B.'s acceptances, might recover back the gold and bills sent after B.'s bankruptcy, on the ground that they were sent for the particular purpose of paying those acceptances, and that, as the purpose was not answered, the property in the gold, &c., remained in A., for whom B. should be considered as the factor or banker. *Tooke v. Hollingworth*, 5 T. R. 215.; *S. C. 2 H. Bl.* 501.

Where A., having agreed to lend B. 200*l.* to be applied to a specific purpose, drew a check on his banker for that sum, and delivered it to B., who afterwards became bankrupt, and B., not having used the check, returned it to A. after having committed an act of bankruptcy, it was held that B.'s assignees could not maintain trover for the check. *Moore v. Barthrop*, 1 B. & C. 5. And where A. advanced money to B., then lying in prison, for the purpose of settling with his creditors, and the purpose failing, part of such money was repaid to A. by B., who became bankrupt by lying two months in prison, it was held that the assignees could not recover the money so repaid. *Toovey v. Milne*, 2 B. & A. 683. If money received by an overseer of the poor be kept apart from his general property, it will not pass to his assignees. *R. v. Egginton*, 1 T. R. 370.

Evidence of reputed ownership—in the bankrupt's possession as trustee.] Property, which is in the bankrupt's hands as trustee only, will not pass under the assignment to his assignees. *Winch v. Keeley*, 1 T. R. 619.; *Smith v. Pickering, Peake*, 50.; *Taylor v. Plumer*, 3 M. & S. 576. Thus it has been held, that where shares in an insurance company are in the name of the bankrupt, as trustee, they are not in his reputed ownership. *Ex parte Watkins*, 1 Mont. & Ayr. 689.

Defence.

The defendant may either controvert the title of the plaintiffs as assignees; or the cause of action; or both.

Plea denying that the plaintiffs are assignees.] A plea, denying that the plaintiffs are assignees *modo et formâ*, puts them upon proof of strict

title, i. e. of trading, petitioning creditor's debt, act of bankruptcy, &c. *Buller v. Hobson*, 4 *New Ca.* 290.; *Buckton v. Frost*, 8 *A. & E.* 844. This plea is rendered necessary by the rules *H. 4 W.* 4., which direct that in all actions by and against assignees of a bankrupt, &c. the character in which the party is stated on the record to sue or be sued, shall not be considered in issue unless specially denied. It must be observed, however, that the plea will not supersede the notice required by 6 *Geo. 4. c. 16. s. 90.* See *antè*, p. 548.; and that proof of strict title may still be wholly or partially dispensed with by the operation of the various statutes already referred to, or by implied admissions; see *suprà*, p. 544—548.

Plea of Not guilty in trover by assignees.] Where the declaration alleged a possession by the plaintiffs as assignees and a conversion after the bankruptcy, and the plea was Not guilty, it was held that a sale of the bankrupt's goods by the defendant, under an execution before the bankruptcy, did not support the issue, though there had been a demand and refusal by the defendant afterwards; for the sale was the real conversion. *Edwards v. Hooper*, 11 *M. & W.* 363.

Plea of Not possessed, in trover by assignees.] The defendant may shew under this plea that he took the goods in execution *bonâ fide* without notice of bankruptcy. *Unwin v. St. Quintin*, 11 *M. & W.* 277. So he may shew that the plaintiffs permitted the goods to remain in the order and disposition of the bankrupt, and that the property consequently passed to the provisional assignee by assignment under the insolvent debtor's act, of which the bankrupt had afterwards prayed the benefit. *Buller v. Hobson*, 4 *New Ca.* 290. But there is no authority to shew that under this plea the character of the plaintiffs as assignees can be questioned; though it is so stated (erroneously, *ut videtur*) in the marginal note to *Buckton v. Frost*, 8 *A. & E.* 844. Where the plaintiffs were assignees of A. when the conversion took place, and afterwards became assignees of A. & B., and declared in trover alleging the property in themselves as assignees of A. & B., they cannot recover even a moiety; for they were not, at the time of conversion, possessed as assignees of both bankrupts. *Edwards v. Hooper*, 11 *M. & W.* 363.

The defendant may shew that the equitable interest passed to him before the bankruptcy; for the assignees only take what the bankrupt is equitably as well as legally entitled to, and therefore an equitable assignment made before bankruptcy prevents the property from vesting in the assignees. *Carvalho v. Burn*, 4 *B. & Ad.* 382.; *Tibbitts v. George*, 5 *A. & E.* 107. The same doctrine applies to the assignees of an insolvent. See *Best v. Angles*, 2 *C. & M.* 394.; *S. C.*, 4 *Tyrrwh.* 256. In *Mogg v. Baker*, 3 *M. & W.* 195. it was held, that if A. agrees to assign to B. certain specific goods by way of security, for money advanced by B. for the purchase of them, and afterwards in pursuance of such agreement actually assigns them, although the assignment itself be under such circumstances as would have rendered it void under the Insolvent Debtor's Act, and A. subsequently takes the benefit of that act, yet his assignees are not entitled to the goods; but it would be otherwise if the agreement related to such goods as A. might have at the time of the execution of the assignment, their *corpus* not being ascertained at the time of the agreement.

What payments to and by, and transactions with, the bankrupt are protected by 6 Geo. 4. c. 16.] The defendant may protect himself by insisting that he comes within the clauses of the bankrupt act, by which, in various cases, transactions with the bankrupt, without notice of his bankruptcy, are declared good. And where the defence is in substance a denial that the property in the goods, for which the plaintiffs sue in trover as assignees, passed to them, a simple traverse of such property is sufficient. See Parke B. in *Carr v. Burdiss*, 1 C. M. & R. 787, 788.; *Turquand v. Hawtrey*, 9 M. & W. 727.

By 6 Geo. 4. c. 16. s. 81., all conveyances by, and all contracts and other dealings and transactions by and with any bankrupt, *bonâ fide* made and entered into more than two calendar months before the date and issuing of the commission against him, and all executions and attachments *bonâ fide* executed or levied more than two calendar months before the issuing of such commission, are valid notwithstanding any prior act of bankruptcy, provided the person so dealing with him, or at whose suit such execution or attachment shall have issued, had not, at the time of such conveyance, &c. notice of any prior act of bankruptcy.

Under this act on a commission issuing on May 14th, a dealing on March 14th is valid, "as more than two calendar months before the issuing of the commission." *Cowie v. Harris*, M. & M. 141. A seizing of goods under a *fi. fa.* at eleven o'clock on the 13th of August, is a levying more than two months before the issuing of a commission issued at twelve o'clock on the 13th of October. *Godson v. Sanctuary*, 4 B. & Ad. 255.

By section 82. of the same act, all payments really and *bonâ fide* made, or thereafter made, by any bankrupt, or any person on his behalf, before the date and issuing of the commission (such payment not being a fraudulent preference of the creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt; and all payments really and *bonâ fide* made, or thereafter made, to any bankrupt before the date and issuing of the commission, shall be deemed valid notwithstanding any such prior act of bankruptcy; and such creditor shall not be liable to refund to the assignees, provided the person so dealing with the bankrupt had not, at the time of such payment by or to the bankrupt, notice of any act of bankruptcy.

A delivery of goods *bonâ fide* made in part payment of a previous debt after a secret act of bankruptcy committed by the debtor is a payment protected by this section. *Cannon v. Wood*, 2 M. & W. 465.

It is not necessary that the payment should be of a precedent debt to bring the case within this statute. Thus, where A. purchased of B., a hop-merchant, a library, and paid him the value, B. at that time having committed an act of bankruptcy of which A. had no notice, it was held that B. was protected by the above clause. *Hill v. Farnell*, 9 B. & C. 45. See also *Churchill v. Crease*, 5 Bing. 177.; *Bishop v. Crawshaw*, 3 B. & C. 415. Giving cash for a bank post bill, is a payment protected by the above clause. *Willis v. Bank of England*, 4 A. & E. 21. A payment by a partner, who has committed an act of bankruptcy, of a partnership debt due before bankruptcy, to a creditor who has notice of the act of bankruptcy, is not protected by this statute. *Craven v. Edmondson*, 6 Bing. 734. A payment for goods purchased of a bankrupt just before his bankruptcy is not protected by the above clause, if the purchaser knows, or has the means of knowing, the bankrupt's circumstances.

Devas v. Venables, 3 New Ca. 400. See *Green v. White*, *ibid.* 59. And where a trader, who had committed a secret act of bankruptcy, assigned chattels to a creditor as a security for money lent in trust to permit the trader to use the chattels till March, 1833, and then to sell them in discharge of the debt, if unpaid; and in October, 1832, within two months after this assignment, a fiat issued, it was held that the assignment was not protected by sec. 82. of 6 Geo. 4. *Cannan v. Denew*, 10 Bing. 292. So where a plaintiff, within two months before the issuing of the fiat, deposited chattels by way of pledge in consideration of an advance of money, the Court of Common Pleas held that the transaction, though *bonâ fide* and without notice of an act of bankruptcy, was not protected by the 82d section. *Wright v. Fearney*, 5 New Ca. 89. Such transaction would be protected by the 81st section, if the two months had elapsed before the issuing of the fiat. *Ibid.*

Though notice of a docket may not of itself be esteemed notice of an act of bankruptcy, yet connecting such a notice with the circumstance of the defendant's requiring security before they made the payment, a jury will be justified in finding the fact of notice. *Spratt v. Hobhouse*, 4 Bing. 181. As to notice to the Bank of England with regard to the transactions of its branch banks, see *Willis v. Bank of England*, 4 A. & E. 21.

By section 83., the issuing of a commission shall be deemed notice of a prior act of bankruptcy, if the adjudication of the person or persons, against whom such commission has issued, shall have been notified in the *London Gazette*, and the person to be affected by such notice may reasonably be presumed to have seen the same.

By section 84., no person having in his possession or custody any money, goods, or effects belonging to any bankrupt, shall be endangered by reason of the payment or delivery thereof to the bankrupt, or his order, provided such person had not, at the time of such delivery or payment, notice of an act of bankruptcy.

By section 85., if any accredited agent of any body corporate or public company shall have notice of any act of bankruptcy, such body corporate or company shall be thereby deemed to have had such notice.

By section 86., no purchase from any bankrupt, *bonâ fide*, and for valuable consideration, where the purchaser had notice at the time of such purchase of an act of bankruptcy by such bankrupt committed, shall be impeached by reason thereof, unless the commission against such bankrupt shall have been sued out within twelve calendar months after such act. See also 2 & 3 Vict. c. 11. s. 13.

What dealings and transactions with the bankrupt are protected by 2 & 3 Vict. c. 29.] By 2 & 3 Vict. c. 11. s. 12, 13., certain conveyances and purchases by and from bankrupts, without notice of a prior act of bankruptcy, are protected. This act passed 4th June, 1839. But at the same session another act, c. 29., passed on 19th July, with much more extended provisions.

By the latter act all contracts, dealings, and transactions by and with any bankrupt really and *bonâ fide* made and entered into before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements or goods and chattels of such bank-

rupt, *bona fide* executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed; provided also that nothing herein contained shall be deemed or taken to give validity to any payment made by any bankrupt, being a fraudulent preference of any creditor or creditors of such bankrupt, or to any execution founded on a judgment on a warrant of attorney or cognovit given by any bankrupt by way of such fraudulent preference.

The effect of this act is to destroy the relation of the title of the assignees to the act of bankruptcy as to all *bona fide* transactions prior to the fiat. But the transaction must be in other respects valid: therefore, where the act of bankruptcy is by procuring the bankrupt's goods to be taken in execution, the execution, though levied *bona fide* by the creditor, is not protected. *Hall v. Wallace*, 7 M. & W. 353. The act has not the effect of rendering valid an execution by *f. fa.* on a warrant of attorney, such *f. fa.* having been executed by seizure after a secret act of bankruptcy, but not completed by sale before the issuing of the fiat; though the warrant was not a fraudulent preference. But *semb.* an execution by mere seizure would have been protected, if the judgment had been on a verdict. *Whitmore v. Robertson*, 8 M. & W. 463. And the concluding proviso of the act does not imply that all executions, not being by way of fraudulent preference, are necessarily made valid. *S. C.* 476. See also *Rardon v. Wentworth*, 10 M. & W. 36.; *Shey v. Carter* (on error), 11 M. & W. 571.

A right of lien arising before fiat may be protected by this act. *Semb. Bowman v. Malcolm*, 11 M. & W. 833. Notice to the sheriff's officer of an act of bankruptcy is not notice to the creditor under whose *f. fa.* he is in possession. *Ramsay v. Eaton*, 10 M. & W. 22. But a general notice to the creditor is sufficient without stating the particulars. *S. C. Ib.* And notice to the attorney of the creditor before he sues out execution is sufficient, though the fiat issued after the writ was lodged with the sheriff. *Rothwell v. Timbrell*, 1 Dowd. N. S. 778.

A doubt has been expressed by the court, in *Turquand v. Vanderplank*, 10 M. & W. 180., whether a payment by a bankrupt is protected by this statute, or is still governed by 6 Geo. 4. c. 16. s. 81.

The fiat was bespoken at twelve o'clock, and the seizure by an execution creditor at two p. m. The fiat was delivered at the bankrupt's office after two o'clock. Held that the execution was protected; for the delivery of the fiat is the "date and issuing," within the act. *Pewtress v. Annan*, 9 Dowd. P. C. 828.

It is reported to have been ruled at Nisi Prius, that the protection of this statute is not available under a plea denying the plaintiff's property in trover; *Byers v. Southwick*, 9 C. & P. 320.; but in cases where the statute prevents the vesting of the property in the plaintiff by confirming that of the defendant, it seems upon principle that this plea is sufficient.

Evidence of set-off.] By 6 Geo 4. c. 16. s. 16., where there has been mutual credit or mutual debts between the bankrupt and another, one debt or demand may be set against the other, notwithstanding a prior act of bankruptcy; and the balance alone shall be claimed or paid; and every debt or demand provable against the estate may be set off against it, provided the person claiming the set-off had not, when credit was given, notice of an act of bankruptcy committed.

The term *mutual credit* is held to have a more extensive meaning than *mutual debt*. *Ex parte Prescott*, 1 *Atk.* 230. A mutual credit may be constituted, though the parties did not mean particularly to trust each other; as where a bill of exchange, accepted by A., gets into the hands of B., and B. buys goods of A., it is a mutual credit between A. and B., though A. did not know that the bill was in B.'s hands. *Hankey v. Smith*, 3 *T. R.* 507 (n). It is now settled that the term *mutual credit* is confined to such credits only as must, in their nature, terminate in debts; as where a debt is due by one party, and credit is given him on the other side for a sum of money, payable on a future day, and which will then become a debt; or where there is a delivery of property on one side, with directions to turn it into money on the other; in such case the credit given by the delivery of the property must in its nature terminate in a debt, the balance will be taken on the two debts, and the words of the statute will, in all respects, be complied with; but where there is a mere deposit of property without any authority to turn it into money, no debt can arise out of it, and, therefore, it is not a credit within the meaning of the statute. *Rose v. Hart*, 8 *Taunt.* 499.; *Gibson v. Bell*, 1 *New Ca.* 748.; *Young v. The Bank of Bengal*, 1 *Dea. B. Cases*, 622. Therefore a guarantee against contingent damages, which cannot terminate in a debt, is not the subject of mutual credit. *Sampson v. Burton*, 2 *B. & B.* 89. These decisions on the repealed act are to be considered as authorities upon the new bankrupt act, though the words of the latter are, that one debt, "or demand," may be set off against another. *Eden*, 194.; *Ex parte Marshall*, 1 *Mont. & Ayr.* 139.

Under the new rules of pleading, the defence of set-off or "mutual credit," must be specially pleaded. Before those rules, the defence was admissible under the general issue, and the kind of debts or demands that might be mutually set off, as between assignees and the bankrupt's debtor, was therefore the subject of enquiry at *Nisi Prius*. Since the new rules, this question is raised on the record, and the nature of the evidence depends on the facts alleged in the plea, and traversed by the replication.

Competency of Witnesses.

Before the passing of 6 & 7 Vict. c. 85., it was a well established rule (though the principle of it has been doubted), that a bankrupt, even after obtaining his certificate and releasing his share of the surplus, was incompetent to prove or disprove any fact necessary to support the commission. Nor was he a competent witness to increase his estate; for his right to an allowance (depending on the dividends), and to the surplus, excluded him on the ground of interest; unless he had obtained his certificate, and released his share in the surplus and the dividends to his assignees, or had executed a general release to them.

But he might have been called to *diminish* the fund, though not certificated; or to prove any fact immaterial to the support of the commission; as to prove the handwriting of the commissioners, &c.

So a creditor was not a competent witness to increase the fund out of which his dividends were payable, or to support the commission, which was considered as a benefit to the witness, since it brings a divisible fund within his reach. The cases on this subject have now become unimportant in all suits or proceedings commenced since the passing of the 6 & 7 Vict. c. 85. (22d August 1843); for which see Appendix IV.

ACTIONS AGAINST ASSIGNEES OF BANKRUPTS.

Actions against assignees are usually brought either by bankrupts to try the validity of the fiat, or by creditors and others who assert a title to property taken under it by the defendants. As it is not usual to sue the defendants *as assignees*, stating their character as such on the record, the rule of H. 4 W. 4. (*antè*, p. 559.) providing that their character shall not be considered in issue, when stated on the record to be sued in that character, without a special denial, appears to be inapplicable where they are defendants.

The provisions already mentioned, *antè*, p. 547, 548., which makes the proceedings, to a certain extent, evidence of their title, applies to cases where assignees are defendants, though not named as such; unless the plaintiff is ignorant that the defendants, or those under whom they justify, make title under the fiat. *Simmonds v. Knight*, 3 Camp. 251.; *Gilman v. Cousins*, 2 Stark. 182. And where the assignees are strangers to the record, as where the defendants set up their title in ejectment, that title must be regularly and strictly proved. *Doe v. Liston*, 4 Taunt. 741.

We have seen (*antè*, p. 549.) that the bankrupt may be estopped by his own acts or admissions from disputing his bankruptcy. He is also in effect precluded by disputing the adjudication unsuccessfully in the Court of Review, 1 & 2 W. 4. c. 56. s. 17.; or before the commissioners; 5 & 6 Vict. c. 122. s. 23, 24. See *antè*, p. 546, 547. Official assignees are exempt from liability by reason of insufficiency in the debt, trading, or act of bankruptcy; 5 & 6 Vict. c. 122. s. 54.

Where the plaintiff sues in trespass for breaking his house and taking his furniture, the assignees may shew, on a plea denying the property of the plaintiff, that they were fraudulently assigned to him before the bankruptcy. *Smith v. Groom*, 2 M. & Rob. 388. So the defendants may shew under the same plea in trover that the goods passed to them, as being in the order and disposition of the bankrupt. *Isaac v. Belcher*, 5 M. & W. 139.

Limitation of actions by 6 Geo. 4. c. 16.] By sect. 44. actions for things done in pursuance of the act are limited to three calendar months

next after the fact committed, and the defendant may plead the general issue, and give the act and the special matter in evidence.

This limitation does not apply to the seizure by assignees of the property of third parties; *Edge v. Parker*, 8 B. & C. 701.; for they act not by virtue of any special powers given by the statute, but by virtue of the property vesting, or claimed to vest, in them in the goods in question. *Knight v. Turquand*, 2 M. & W. 105.

ACTIONS BY OR AGAINST BANKRUPTS.

The case of actions by bankrupts against assignees, &c., to try the validity of the fiat, is noticed under the last head.

Evidence on plea of bankruptcy of the plaintiff.] This defence must generally be pleaded specially, as in assumpsit and debt. In trover such a plea would amount to a traverse of the property, under which it would be proper evidence. See *Fyson v. Chambers*, 9 M. & W. 480. 463, 464. The provisions of the bankrupt acts, making the certificate evidence of the bankruptcy, apply to cases in which the bankrupt uses it in his own favour. See the clause, *infra*. As it is obtained upon his application, it is evidence as against him, though not conclusive, of every thing essential to a valid bankruptcy; and this without the aid of the statute. *Fyson v. Chambers*, *supra*.

As to proof of the certificate, under 2 & 3 W. 4. c. 114. sect. 9., see *anté*, p. 544, 545.

Where the bankrupt is permitted by the assignees to manage the estate, or carry on the business in their behalf (as they are authorised to do by 1 & 2 W. 4. c. 56. s. 35.), it has been suggested that in an action of assumpsit in his own name, founded on such dealing, his bankruptcy may perhaps be still evidence under Non assumpsit; for he is a mere agent or servant of the assignees. *Archbold, N. Pri.* 92.

Evidence on plea of bankruptcy of the defendant.] By 6 Geo. 4. c. 16. s. 126., any bankrupt who shall, after his certificate shall have been allowed, have any action brought against him for any debt, claim, or demand by that act made provable under the commission against him, may plead, in general, that the cause of action accrued before he became bankrupt, and may give the act and the special matter in evidence; and such bankrupt's certificate, and the allowance thereof, shall be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining such certificate. A similar clause is inserted in 5 & 6 Vict. c. 122. s. 42.

A certificate of conformity under a fiat must appear to have been entered of record in the court of bankruptcy. 2 & 3 Wm. 4. c. 114. s. 8. *anté*, p. 544. A certificate obtained after the above statute, on a com-

mission issued before it, is proved by the production of the certificate duly allowed. *Taylor v. Welsford, M. & M.* 503.

The defence of bankruptcy cannot be given in evidence under the general issue, but must be pleaded either at full length as at common law, or in the form prescribed by the statute. *Gowland v. Warren*, 1 *Camp.* 363. Under that plea a certificate allowed after the commencement of the suit, but before plea pleaded, may be given in evidence; *Harris v. James*, 9 *East*, 82.; but if allowed after plea pleaded, it should be pleaded *puis darrien continuance*. *Langmead v. Beard*, cited 9 *East*, 85. If a commission issue against a person by a wrong name, and he obtains his certificate under it, and an action is afterwards brought against him in his right name, on a plea of bankruptcy he may shew that he is the person against whom the commission issued, and that he has gone by the name by which he is described in the commission. *Stevens v. Elizee*, 3 *Camp.* 256.

Where issue was joined on the fact of a discharge under a former commission, the affidavit of conformity was held to be good secondary evidence of the certificate, after a notice to produce. *Graham v. Grill*, 4 *Camp.* 282. So where to prove that the defendant, who pleaded his bankruptcy, had been before discharged as a bankrupt, a witness stated that he had been employed by the defendant to solicit his certificate, and that looking at the entries in his books he had no doubt that it had been allowed by the Lord Chancellor, it was held sufficient, notice to produce the certificate having been given; but it was ruled that the book in the bankrupt office, containing entries of the allowance of certificates, was not sufficient secondary evidence. *Henry v. Leigh*, 3 *Camp.* 499.

In answer to the plea of bankruptcy, the plaintiff may shew that the defendant had before been a bankrupt, and had not paid 15s. in the pound under the second commission, and it is sufficient for the plaintiff to produce the commission and the proceedings, and to shew that the defendant submitted to them. *Haviland v. Cook*, 5 *T. R.* 655.; 2 *Christ. B. L.* 670.

A certificate under a joint commission may be given in evidence in an action for a separate debt, and *vice versa*. *Horsey's case*, 3 *P. Wms.* 23.; *Ex parte Yale*, *id.* 24 (n).

Evidence in reply to a plea of bankruptcy of the defendant.] Where the general plea of bankruptcy is pleaded, which concludes to the country, the plaintiff can only reply the *similiter*; *Wilson v. Kemp*, 2 *M. & S.* 549.; *Hughes v. Morley*, 1 *B. & A.* 22.; and under this replication the plaintiff may give in evidence any matters which by 6 *Geo. 4. c. 16. s. 130.*, or otherwise, render the certificate void, *ibid.*; as a loss by gaming of 20*l.* in one day, though he afterwards on the same day wins more. *Es parte Newman*, 2 *Glynn & J.* 329.

Evidence of subsequent promise.] By 5 & 6 *Vict. c. 122. s. 43.* (repeating *s. 131. of 6 Geo. 4. c. 16.*), no bankrupt, after his certificate shall have been confirmed, shall be liable to pay or satisfy any debt, claim, or demand from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim, or demand, upon any contract, promise, or agreement made or to be made after

the suing out of the commission, unless such promise, contract, or agreement be made in writing, signed by the bankrupt, or by some person thereto lawfully authorised in writing by such bankrupt.

The initial of the defendant's surname is not a sufficient signature within this clause. *Hubert v. Moreau*, 2 C. & P. 528.

ACTIONS AGAINST CONSTABLES.

Local venue. Pleading by officers, &c.] By 21 Jac. 1. c. 12. s. 5. (enlarging and perpetuating 7 Jac. 1. c. 5.), if any action upon the case, trespass, battery, or false imprisonment, shall be brought against any justice of peace, mayor or bailiff of city or town corporate, headborough, portreve, constable, tithing-man, churchwarden or overseer of the poor, and their deputies, or any of them, or any other which in their aid and assistance, or by their commandment, shall do any thing touching or concerning his or their office or offices, for or concerning any matter, cause, or thing, by them, or any of them, done by virtue or reason of their or any of their office or offices, the said action shall be laid within the county where the trespass or fact shall be done and committed, and not elsewhere; and it shall be lawful to and for all and every person and persons aforesaid, to plead the general issue, and give the special matter in evidence.

By 43 Geo. 3. c. 85. s. 6., the benefit of the above act is extended to all persons holding or exercising any public employment, or any office, station, or capacity, civil or military, in or out of the kingdom, and who, by virtue of any act or law within the kingdom, or any act, law, ordinance, or lawful authority in any foreign possession of his majesty, have, or may hereafter have, by virtue of such employment, office, station, or capacity, authority to commit persons to safe custody. The local venue is however dispensed with in the case of offences committed abroad. Other statutes have still further extended the benefit of this act to various other officers and those acting under them.

Cases within the above statutes.] A constable who imprisons a person on suspicion of felony without any reasonable grounds, of his own authority and without warrant, is within 21 Jac. 1.; and a private person, who acts in aid of the constable, is also within it; unless he acts, not merely in aid, but as a prime mover and principal (which is a question for the jury), in which case the statute does not apply to him. *Staight v. Gee*, 2 Stark. 445.; *Bond v. Rust*, 2 C. & P. 342. Where the prosecutor, who had obtained the warrant, pointed out the party to the constables, Lord Ellenborough held that he was acting in their aid within the meaning of the statute. *Nathan v. Cohen*, 3 Camp. 257. But where A. sent for B., a constable, and gave the plaintiff in charge for a felony,

Bayley J. ruled that A. was not within the statute, and must plead specially. *McCaughan v. Cleyson, Holt, N. P. C. 478.* Parish officers, sued for goods sold and delivered for the poor are not within it. *Bianchini v. Bramble, 3 M. & S. 131.* Commissioners of a court of requests, having power to commit for contempt, are not within the stat. 43 Geo. 3. c. 83. *Per Patteson J., Mackey v. Goodden, 1 Dowd. P. C. 463.*

Demand of copy of warrant; By 24 Geo. 2. c. 44. s. 6., no action shall be brought against any constable, headborough, or other officer, or against any person or persons acting by his order and in his aid for any thing done in obedience to any warrant under the hand or seal of any justice of the peace, until demand hath been made or left at the usual place of his abode by the party or parties intending to bring such action, or by his, her, or their attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for the space of six days after such demand; and in case after such demand and compliance therewith by shewing the said warrant to, and permitting a copy to be taken thereof by the party demanding the same, any action shall be brought against any such constable, &c., without making the justice who signed or sealed the said warrant defendant, on producing and proving such warrant at the trial of such action, the jury shall give their verdict for the defendant notwithstanding any defect of jurisdiction in such justice. And if such action be brought jointly against such justice and constable, &c., then on proof of such warrant the jury shall find for the constable, &c., notwithstanding such defect of jurisdiction.

What persons are within the statute 24 Geo. 2.] Churchwardens and overseers of the poor taking a distress for poor's rates are entitled to the protection of the statute. *B. N. P. 24.; Harper v. Carr, 7 T. R. 271.* So a gaoler, who receives and detains a prisoner under the warrant of a magistrate. *Butt v. Newman, Gow, 97.* This section is obviously intended to protect the officer in those cases only where the justice remains liable, and it is necessary, in order to bring the officer within it, that he should act most strictly in obedience to his warrant. *Per Abbott C. J., Parton v. Williams, 3 B. & A. 333.* Therefore, when there is no remedy against the justice, no demand of a copy is necessary. *Cotton v. Kadwell, 2 Nev. & M. 399.* Thus where an officer apprehends a different person from him described in the warrant, he is not protected; *Money v. Leach, 3 Burr. 1742;* although the person apprehended is the party against whom the warrant ought to have issued. *Hoye v. Bush, 1 M. & G. 775.* So where a constable, having a warrant to search for 100lbs. weight of cotton which had been stolen, took also a tin pan and sieve which were claimed by the party robbed, but were not mentioned in the warrant, nor likely to furnish evidence of the identity of the articles stolen. *Crozier v. Cundey, 6 B. & C. 232.* So where, not acting in obedience to the warrant, he executes it out of the jurisdiction of the magistrate by whom it is granted. *Milton v. Green, 5 East, 233.* Or where, in executing a warrant of distress, he enters a house and breaks the windows, &c. *Bell v. Oakley, 2 M. & S. 259.*

But it will not deprive the officer of the protection of the statute

that the warrant was illegal, provided he acted in obedience to it; as, where the goods were described as "stolen goods," and the officer took them though they were not in fact stolen. *Price v. Messenger*, 2 B. & P. 158. And, generally, a want of jurisdiction in the justices will not deprive the officer of the benefit of the statute. *Atkins v. Kilby*, 11 A. & E. 777. If the defendant carried the plaintiff to gaol by a circuitous route, yet it is no ground of action, provided the jury find it to be the most convenient. *S. C. ib.* Where overseers distrained for a poor rate and sold within four days goods in custody of the bailiffs of a landlord under a distress for rent, it was held, in an action by the landlord against the overseers, that no demand of a copy of the warrant was necessary; for the warrant could not authorise such sale. *Whitley v. Roberts*, M.C. & Y. 107.; *Kay v. Grover*, 7 Bing. 312. So, in an action against overseers for excessive distress for a poor rate, no demand is necessary. *Sturch v. Clarke*, 4 B. & Ad. 113.

The act extends only to warrants of justices of the peace, and not to a warrant granted by a judge of the King's Bench. *Gladwell v. Blake*, 1 C. M. & R. 636.

What actions are within the statute.] The act extends only to actions of tort; and therefore where an action for money had and received was brought against an officer who had levied money on a conviction which had been quashed, it was held that a demand of a copy of the warrant was not necessary. *B. N. P.* 24. But see *Waterhouse v. Keen*, 4 B. & C. 200. Replevin is not an action within the statute. *Fletcher v. Wilkins*, 6 East, 263.

Evidence of demand.] The demand may be proved by the production of a duplicate original without a notice to produce; *Jory v. Orchard*, 2 B. & P. 39.; and it is sufficient if the demand be signed by the plaintiff's attorney. *Ibid.* Where the declaration does not charge the defendants as officers, the plaintiff need not, in the first instance, prove a demand of a copy of the warrant. If the defendants mean to justify under the warrant, that proof lies upon them, and when they come to that part of the case the plaintiff must prove a demand. *Price v. Messenger*, 3 Esp. 96. Where, in trespass, defendant justified by a special plea under a distress for a poor rate, and the question was a mere question of parochiality or not, the defendant, after admitting a demand of a copy, was held entitled to begin. *Burrell v. Nicholson*, 1 M. & Rob. 304. Where the warrant was in the hands of the gaolers, and the agent of the plaintiff made no objection to the copy when tendered, it was held that the perusal of the original was dispensed with. *Atkins v. Kilby*, 11 A. & E. 777. The demand need not specify the time within which it should be complied with; therefore where a copy was required "within three days," this will not vitiate the demand. *Collins v. Rose*, 5 M. & W. 194.

If the constable refuse or neglect, for the space of six days, to comply with the demand, the constable may be sued as before the statute. But if he complies with the demand at any time before action brought, though more than six days after the demand, he will be within the protection of the act. *Jones v. Vaughan*, 5 East, 445.

Limitation of action.] By 24 Geo. 2. c. 44. s. 8., no action shall be

brought against any justice of the peace for any thing done in the execution of his office, or against any constable, headborough, or other officer or person acting as aforesaid (see s. 6., *suprà*, p. 568.), unless commenced within six calendar months after the act committed.

The object of this section differs from that of the sixth, being intended for the benefit of persons who intend to act right, but by mistake act wrong. *Per* Abbott C. J., *Parton v. Williams*, 3 B. & A. 333. And the officer is entitled to the protection of this section of the statute, provided he acts *bonâ fide* in his character of officer, and under a belief that he is discharging the duty with which he is invested. *Per* Bayley J., *id.* 338. Therefore, where some constables, under a warrant to search for black cloth which had been stolen, finding no black cloth took cloth of other colours, and carried it before a magistrate, refusing at the same time to tell the owner of the house searched whether they had any warrant to do so; it was held, that they were within this section of the statute, and that the action ought to have been commenced within six months. *Smith v. Wiltshire*, 2 B. & B. 619. So where a constable, acting under a warrant commanding him to take the goods of A., took the goods of B., believing them to belong to A., it was held that the action must be brought within six months. *Parton v. Williams*, 3 B. & A. 330. It was ruled by Lord Kenyon, in *Postlethwaite v. Gibson*, 3 Esp. 226., that a constable taking a person into custody on suspicion of felony, without a warrant, was not within the protection of this section; but this decision has been questioned in *Parton v. Williams*, 3 B. & A. 334., and *Smith v. Wiltshire*, 2 B. & B. 622. But there is no doubt that he is not within it where he acts without warrant and without view. *Per* Lord Abinger, C. B., *Ballinger v. Ferris*, 1 M. & W. 630. It was laid down by Lord Kenyon C. J. that where a constable acts *colore officii*, and not *virtute officii*, he is not protected by the statute; where the act committed is of such a nature that the office gives him no authority to do it, in the doing of that act he is not to be considered as an officer; but where a man, doing an act within the limits of his official authority, exercises that authority improperly, or abuses the discretion placed in him, to such cases the statute extends. *Alcock v. Andrews*, 2 Esp. 542. (n.) The true test, however, seems to be, whether he acts under an honest belief that he is discharging the duty of his office. See *Parton v. Williams*, *suprà*.

Evidence of arrest.] In actions against constables it sometimes becomes a question whether the evidence is sufficient to establish an arrest. Where the constable went with the warrant to the plaintiff's house and shewed it to him, and after some conversation the plaintiff attended the constable to the magistrate by whom the charge was dismissed, the constable having never touched the plaintiff, it was held that this was no arrest; for that the plaintiff went voluntarily before the magistrate. *Arrowsmith v. Le Mesurier*, 2 New Rep. 211. So where the officer told the party that he had a writ against him, to which the latter replied, "Very well, I will come to you immediately," but kept his seat, and on the officer quitting the room made his escape, it was ruled by Abbott C. J. to be no arrest. *Russen v. Lucas*, R. & M. 28. But where the constable said to the plaintiff, "You must go with me," on which the plaintiff said, "he was ready to go," and went with the constable towards a police office, without being seized or touched, this was ruled to

be an imprisonment; and *per* Abbott C. J., "if a person send for a constable, and give another in charge for felony, and the constable tell the party charged that he must go with him, on which the other, in order to prevent the necessity of actual force, expresses his readiness to go, and does actually go, this is an imprisonment." *Pocock v. Moore*, *R. & M.* 321.; *Chinn v. Morris*, *2 C. & P.* 361. The law on this point was thus laid down by Eyre C. J. in *Simpson v. Hill*, *1 Esp.* 431.: "If the constable, in consequence of the defendant's charge, had for one moment taken possession of the plaintiff's person, it would be in point of law an imprisonment; as, for example, if he had tapped her on the shoulder and said, 'You are my prisoner,' or if she had submitted herself into his custody, such would be an imprisonment; but the merely giving her in charge, without taking possession of the person, where nothing more passes than merely the charge, is not by law a false imprisonment." In the following case the circumstances were held to constitute an imprisonment. The plaintiff appeared before the defendant, a magistrate, to answer the complaint of A. for unlawfully selling his dog. The defendant advised the plaintiff to settle the matter by paying a sum of money, which the plaintiff declined. The defendant then said, "He would convict the plaintiff in a penalty under the trespass act, in which case he would go to prison." The plaintiff still declined paying, and said he would appeal. The defendant then called in a constable, and said, "Take this man out, and see if they can settle the matter; and if not bring him in again, as I must proceed to commit him under the act." The plaintiff then went out with the constable, and settled the matter by paying a sum of money: it was held that this was an assault and false imprisonment for which trespass would lie; and which, as no conviction had been drawn up, the defendant could not justify. *Bridgett v. Coyney*, *1 M. & R.* 211. Where a sheriff's officer, having a warrant to arrest A., sent a message to him to fix a time to call and give a bail bond, and A. fixed a time, attended and gave bail in an action for malicious arrest, this was held to be no arrest. *Berry v. Adamson*, *6 B. & C.* 528. See further as to arrest, *antè*, *Case for malicious arrest*, p. 368.

Defence.

The fact of the defendant being a constable or other public officer is sufficiently shewn by proof that he was acting as such; and the regularity of his appointment will be then presumed. *Antè*, p. 25. A constable, having reasonable cause to suspect that a felony has been committed, is justified in arresting the party suspected, though it afterwards appear that no felony has been committed. *Beckwith v. Philby*, *6 B. & C.* 635.; *Davis v. Russell*, *5 Bing.* 354. But it is otherwise in a case of misdemeanor, without a warrant. *Fox v. Gaunt*, *3 B. & Ad.* 798.; and he is in no case justified in handcuffing a prisoner, unless it be necessary to prevent an escape, or an escape be attempted. *Wright v. Court*, *4 B. & C.* 596.

ACTIONS AGAINST REVENUE OFFICERS AND OTHERS ACTING IN THE EXECUTION OF A STATUTE.

Notice of action.] By 28 Geo. 3. c. 37. s. 25., no writ or process shall be sued out against any officer of the customs or excise, or against any person or persons acting by his or their order in his or their aid, for any thing done in the execution or by reason of that or any other act or acts of parliament then in force, or thereafter to be made relating to the said revenues, or either of them, until one calendar month next after notice in writing shall have been delivered to him or them, or left at the usual place of his or their abode, by the attorney, or agent for the person who intends to sue out such writ or process as aforesaid, in which notice shall be clearly and explicitly contained the cause of action, the name and place of abode of the person or persons in whose name such action is intended to be brought, and the name and place of abode of the said attorney, or agent. By section 27., the plaintiff shall not give evidence of any cause of action not contained in the notice. The statute now in operation for the protection of officers of the customs is 3 & 4 W. 4. c. 53. s. 103. to 107.; and of officers of excise, 7 & 8 Geo. 4. c. 53. s. 114. to 119. By 5 & 6 Vict. c. 97. s. 4., in all cases where notice of action is required, it is now sufficient to give one calendar month's notice before action commenced.

The prochein any of an infant, though not the one named in the record, may give notice of action. *De Gondouin v. Lewis*, 10 A. & E. 117.

Limitation of action.] If any action or suit shall be brought or commenced against any person or persons for any thing by him or them done in pursuance of that or any other act or acts of parliament then in force, or thereafter to be made, relating to his majesty's revenues of customs and excise, such action or suit shall be commenced within *three months* next after the matter or thing done. 28 Geo. 3. c. 27. s. 23.

Under this section the action must be commenced within *three lunar months*. *Crooke v. M'Tavish*, 1 Bing. 307.

By 1 & 2 Wm. 4. c. 32. s. 47., for the amendment of the *game-laws*, persons acting in the execution of that act are entitled to have the venue local, to be sued within *six calendar months*, to have notice in writing at least one calendar month before action, to tender amends, and to plead the general issue. *Bush v. Green*, 4 New Ca. 41.

By 5 & 6 Wm. 4. c. 50., (the *Highway Act*) no suit can be brought against any person for any thing done in pursuance of or under the authority of that act after tender of sufficient amends, nor after *three calendar months* after the act done. The venue is to be local, and the plea of the general issue is given, s. 109.

Plea.] The defendant may plead the general issue, and give the special matter in evidence. 23 Geo. 3. c. 70. s. 33.; 24 Geo. 3. sess.

2. c. 47. s. 55., &c. ; and the same plea is given in many other acts ; see *suprà*, *Highway Acts, &c.* An officer of customs may shew a seizure of goods for forfeiture, though he, in fact, took them only to examine and return them, and though he made no previous demand. But in order to justify assaulting the plaintiff and taking the goods, he ought to shew a previous demand, or something to justify force in the first instance. *De Gondouin v. Lewis*, 10 A. & E. 117.

Decisions on the above, and similar acts, for the protection of officers and others.] The general rule seems to be settled, that persons, who *bonâ fide* and honestly believe that they are acting in the execution of the powers conferred on them by such acts as the above, are within their protection, although in fact they may have mistaken the extent of their power, and have exceeded it, or failed to comply with the directions of the statute. See *Smith v. Shaw*, 10 B. & C. 284., and cases, *post*, p. 592.

Under the act, 23 Geo. 3. c. 70. s. 30. (similar to the 28 Geo. 3. c. 37.) it was held that an excise officer was within the statute in respect of an act not warranted by his official capacity, if done *bonâ fide* in the supposed execution of his duty ; such as assaulting an innocent person whom he suspected to be a smuggler. *Daniel v. Wilson*, 5 T. R. 1. But a constable, who seized a person by direction of a custom-house officer who had himself no power to seize, was held not to be within the protection of the act. *Norton v. Miller*, 2 Chitty, Rep. 140. The intent of notice is, that the defendant may know where to find the plaintiff, in order to tender him amends on the receipt of the notice. *Per Lawrence J., Williams v. Burgess*, 3 Taunt. 129.

Where a private person apprehended his late tenant for lopping trees under a supposed custom, and gave him into custody for an alleged offence against the Malicious Trespass Act, 7 & 8 Geo. 4. c. 30., it was held that he could not be sued without one calendar month's notice, if he *bonâ fide* believed he was acting under that statute. *Beechey v. Sides*, 9 B. & C. 806. ; *Reed v. Cowmeadow*, 6 A. & E. 661. So where the defendant entered the plaintiff's house under a warrant to apprehend a third person S., who was not therein, it was held that he was entitled to notice, if he believed *bonâ fide* that he was pursuing the warrant, although the jury in fact found that he had no reasonable ground for believing S. to be there. *Cook v. Clark*, 10 Bing. 19. Acc. *Wedge v. Berkeley*, 6 A. & E. 663. So where a party *bonâ fide* believed that the Building Act enabled him to heighten a party wall, he was held entitled to notice under that act ; *Wells v. Ody*, 2 C. M. & R. 128. ; and it matters not that no part of the act done is within the authority of the statute. *Ballinger v. Ferris*, 1 M. & W. 630. The question of *bonâ fides* is for the jury, *Wedge v. Berkeley*, 6 A. & E. 663.

But it seems that the party cannot claim the protection of such a provision unless he also have *reasonable ground* for believing himself within it. *Cann v. Clipperton*, 10 A. & E. 582. Thus where a constable seized a dromedary in a stable, which had been exhibited in the street, under the supposed powers of a local act to remove nuisances (as animals exhibited in the street, &c.), it was held there was no colour or reasonable ground for the assumed authority, and that no notice was requisite. *Cook v. Leonard*, 6 B. & C. 351. So a defendant, who *bonâ fide* but erroneously thinks that he fills an office which entitles him to

notice, is not on that account entitled to it. *Lidster v. Borrow*, 9 A. & E. 654. Commissioners were appointed who were authorised to appoint constables, watchmen, and other officers for the execution of the purposes of the act; it was also provided, that no action should be commenced against any person or persons for any thing done or to be done by virtue of that act until one month's notice thereof should have been first given to the clerk of the commissioners of the cause of action. Held, 1. that the section requiring notice to be given was not confined to acts done, or directed to be done, by the commissioners, but extended to acts done by constables and watchmen; 2. that evidence of the defendants acting as constables and watchmen was *prima facie* evidence of their being entitled to the protection of the act without other proof of their appointment; and, 3. that where the watchmen had reasonable ground of suspicion that felony had been committed by the plaintiff, and went to the plaintiff's house to apprehend him for such felony, but beat him and used much more violence than was necessary, they were protected by the section requiring notice. *Butler v. Ford*, 1 C. & M. 662.; S. C. 3 Tyr. 677. The reasonableness of the defendant's suspicion is a question for the jury. *Wedge v. Berkeley*, 6 A. & E. 663. Where an act authorised a constable to arrest on the information of another, and the defendant, instead of merely informing the officer, directed him to arrest the plaintiff, it was held that he acted as principal, and was not entitled to notice in an action of trespass, although he may have acted *bonâ fide*. *Hopkins v. Crowe*, 4 A. & E. 774. So where an officer acts under colour of his office only, or to discharge an old grudge, he is not entitled to notice. *Wedge v. Berkeley*, 6 A. & E. 667, 668.

Clauses of protection of this kind are not confined to actions of tort; thus if the plaintiff waives the tort, and sues for money had and received to recover back money improperly exacted as toll under a local act, the toll-collector is entitled to notice. *Waterhouse v. Keen*, 4 B. & C. 200.; *Greenway v. Hurd*, 4 T. R. 553. But where parish officers (under the protection of a similar clause in a local act) are sued on contracts made by them, they are not entitled to notice. *Fletcher v. Greenwell*, 4 Dowl. P. C. 166. And where notice was required before suit for any "act done" under the act, an action for money had and received was held to lie to recover back an overcharge made by tax-collectors, without previous notice. *Umphelby v. McLean*, 1 B. & A. 42.

Where a local Lighting Act enabled the commissioners to appoint constables, and required notice of action against a person doing any thing in pursuance of the act, held that a constable so appointed had no protection beyond other constables, and that notice was not necessary. *Shatwell v. Hall*, 10 M. & W. 523. So where tolls of a market were established by a statute, which required fourteen days' notice of action for any thing done, or omitted to be done, in pursuance of the act, it was held that no notice was necessary before an action brought for defrauding the owner of the market of toll by selling tollable goods near to it. *Bridgland v. Shapter*, Scacc. T. T. 1839; S. C. not S. P. 5 M. & W. 375.

As to the form of notice, see *post*, tit. *Actions against Justices*, p. 594.

ACTIONS BY EXECUTORS AND ADMINISTRATORS.

Evidence of title, as executor or administrator.] By R. G. 4 Wm. 4., in actions by or against executors or administrators, the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered as in issue, unless specially denied.

Even before the above rule, where the plaintiff declared, as executor or administrator, upon a cause of action arising in the time of his testator or intestate, and made *profert* of the probate or letters of administration, the defendant could not, under the general issue, deny the title of the plaintiff as executor, &c. Thus in an action of assumpsit by an administrator on promises to the intestate, the plea of *non assumpsit* admitted the title of the plaintiff, and the defendant was not allowed to insist on the production of the letters of administration, or to object that they were not duly stamped; *Thynne v. Protheroe*, 2 M. & S. 553.; nor that the supposed intestate had made a will and appointed an executor. *Marsfield v. Marsh*, 2 Ld. Raym. 824. So in an action of trover by an administrator on the possession of his intestate, if the defendant pleaded the general issue, he was not allowed to controvert the title of the plaintiff as administrator. *Ibid.* The plea of the general issue, however, only admits the title stated in the declaration; and therefore, if that title be insufficient, the plaintiff cannot recover. Thus in an action by an administrator on a judgment recovered by his intestate in the King's Bench at Westminster (which is *bonum notabile* in Middlesex), where the plaintiff made *profert* of letters of administration from the Archdeacon of Dorset, and the defendant pleaded a plea which admitted the letters of administration, it was held, on motion in arrest of judgment, that in order to enable the plaintiff to recover, he ought to have had letters of administration from the Bishop of London, and that the plea only admitted the plaintiff's title as stated, which was insufficient. *Adams v. Savage*, 6 Mod. 134. See further 2 Wm. Saunders, 47. (n).

If the grant of probate, &c., be absolutely void or repealed, or the seal be forged, a simple denial of the plaintiff's character seems sufficient. *B. N. P.* 143. But where it is avoided as to the particular cause of action by extrinsic matter, it should be specially pleaded. Thus where in an action on a simple contract the plaintiff alleged that administration of all and singular the goods belonging to the intestate was granted to him by the Bishop of C., and the defendant, after craving oyer of the letters of administration, pleaded that the plaintiff had never been administrator of all and singular, &c., in manner and form, &c., upon which issue was joined, it was held that the only fact put in issue was, whether the letters of administration mentioned in the declaration were duly granted? and that the question, whether the defendant resided in the diocese of C. at the time of the death of the intestate, constituted no part of the issue. If the defendant intended to insist that he did not reside there at the time, and that therefore the administration did not operate upon his debt, he ought to have pleaded the fact specially. *Stokes v. Bate*, 5 B. & C. 491.

Formerly, where an executor or administrator declared on a cause of

action arising in his own time, as in trover for goods converted since the death of the testator (but not taken out of the plaintiff's own actual possession), it was held that the plea of Not guilty did not admit his title as administrator; and that, therefore, if the letters of administration were not properly stamped, he could not recover. *Hunt v. Stevens*, 8 Taunt. 118. But it was ruled otherwise where it was needless to prove administration at all. *Watson v. King*, 4 Camp. 372., *antè*, p. 40. If the plaintiff could have proved himself in actual possession of the goods for which the action was brought, it seems that it would not have been necessary for him to give evidence of the letters of administration in an action against a mere wrong-doer; any possession in such case being sufficient. See *antè*, *Trespass and Trover*; *Peake Es.* 395.; and in such a case the naming himself executor may be regarded as surplusage. 2 Will. on Exors., P. 5. B. 1. Ch. 1.

On a plea denying the representative character of the plaintiff, when it becomes necessary to prove the plaintiff's title as executor or administrator, the probate or letters of administration must be produced. See *antè*, p. 81.

Where several join in Case for injury to a leasehold reversion, whose title consists in their being executors, it is enough to produce a probate granted to one of them only; for the title is by the will, and the rest may prove at any time. *Walters v. Pfeil, M. & M.* 362. When the title is in issue, the insufficiency of the stamp on the probate or letters of administration to cover the amount sued for is a fatal objection. *Hunt v. Stevens*, 3 Taunt. 113.; *Carr v. Roberts*, 2 B. & Ad. 905.; but see Lord Abinger C. B., in *Whyte v. Rose*, 3 Q. B. 499.

[*Probate, or administration, when void or voidable.*] Where the grant of letters of administration is merely void, the plaintiff cannot recover; but it is otherwise where it is only voidable. Where the grant of letters of administration is by the archbishop, and there are no *bona notabilia* within his province, such grant is merely void; for each archbishop has supreme jurisdiction, and neither of them can act within the province of the other. *Shaw v. Stoughton*, 2 Lev. 86.; *Allison v. Dickenson*, Hardr. 216.; *Com. Dig. Administration (B. 3.)*. Where there are *bona notabilia* in one diocese of a province, the administration belongs to the bishop of that diocese; but if the metropolitan of that province, in which such diocese is, grants administration, such grant is voidable only, and not void; for it is in force till reversed by sentence; since the metropolitan has jurisdiction over all the dioceses within his province. *Com. Dig. Administration (B. 3.)*; Accord. *Lysons v. Barrow*, 2 New Ca. 485. Where there are *bona notabilia* in two dioceses of the same province, the grant of administration belongs to the archbishop. *Com. Dig. Administration (B. 3.)*; *Stokes v. Bate*, 5 B. & C. 493. And where a man dies intestate leaving *bona notabilia* in the several provinces, administration shall be granted by each archbishop for the goods in his province. *Com. Dig. ubi sup.* If the testator dies *in itinere*, the goods he has about him shall not make his testament liable to the prerogative court. 92 Canon, Jac. 1.; *Doe v. Owens*, 2 B. & Ad. 423. Metropolitan administration of goods within a peculiar is voidable only, if not valid. *Lysons v. Barrow*, 2 New Ca. 486.

Bona notabilia are goods to the value of 5*l.* 93 Canon, Jac. 1.; *Com. Dig. Administration (B. 4)*. Debts on recognizances, statutes, or judg-

ments, are *bona notabilia* where they were acknowledged, given, or recorded. *Ibid.* (B. 4.) Specialties, as bond debts, are *bona notabilia* in the diocese where they are found at the time of the testator's or intestate's death; *Ibid.*; although it be a covenant to pay out of the funds of a company whose stock lies out of the diocese. *Gurney v. Rawlins*, 2 M. & W. 87. But debts by simple contract (as a bill of exchange; *Yeomans v. Bradshaw*, Carth. 373.) are *bona notabilia* in the province in which the debtor resides at the time of the testator's death. *Com. Dig. Administration.* (B. 4.) A lease or term for years is *bonum notabile* in the diocese in which the lands lie. *Ibid.* But lands devised to executors for payment of debts and legacies are not *bona notabilia* 11 Vin. Ab. 80. It seems that foreign bonds and securities of foreign debtors, saleable in this country, cannot be administered here without letters of administration in this country. *Atty. Gen. v. Bouwens*, 4 M. & W. 171. 193. A Canterbury administration is sufficient to support a suit in England on an indenture which was in Ireland when the intestate died. *Whyte v. Rose*, 3 Q. B. 493.; and, generally, a prerogative administration extends to all property wherever in or out of England. *Ibid.* 507. But in such a case as the above, an Irish administration would also be sufficient. *Hulthwaite v. Phaire*, 1 M. & G. 159.

Whether the defendant, when he denies the title of the plaintiff as executor, can shew that probate has been granted by the ordinary, where it ought to have been granted by the metropolitan, appears to be doubtful. If such grant be void, then it would be good evidence under the plea that the plaintiff is not executor. It is clear that administration granted by a bishop or other inferior judge, when it does not belong to him, is void; *Com. Dig. Administration* (B. 5.); accord. *Lysons v. Barrow*, 2 New Ca. 495.; and in one case it is said, that a probate by the diocesan in case of no *bona notabilia* is void; but a prerogative probate, where there are no *bona notabilia*, is only voidable; *R. v. Loggen*, 1 Stra. 75.; and Lord Macclesfield appears to have been of opinion that a probate granted by an inferior judge is not void, but only voidable, until reversed. *Comber's case*, 1 P. Wms. 767.; 1 Saund. 275 a. (n). The reason given for the distinction by Lord Macclesfield is, that an executor takes his authority from the will, but an administrator from the ordinary. Whether the probate be void or not seems to depend on the fact of the ordinary having or not having jurisdiction. The metropolitan has a jurisdiction throughout his province, but the ordinary only in his diocese; and if there be no *bona notabilia* there, he has no jurisdiction, and the probate would seem to be void. So it is said in *B. N. P.* 247. that the adverse party may prove against the probate by an inferior court that the testator left *bona notabilia*; for then such court had no jurisdiction; and see *Allen v. Dundas*, 3 T. R. 131.

Defence.

It has been already stated, *antè*, p. 575., in what cases the defendant may give evidence to disprove the title of the plaintiff as executor or administrator.

With regard to the cause of action, the evidence in defence will be the same as in an action between the defendant and the testator or intestate. But attention must be paid to the form of the declaration. Thus, if the defendant ordered a coat to be made by A., whose exe-

executor finished and delivered it, the executor cannot sue as for goods sold and delivered by A ; but, *semb.*, he must either sue as for sale and delivery by himself as executor, or must declare specially. *Werner v. Humphreys*, 2 M. & G. 853., and note *ad fin.*

The non-joinder of another executor as co-plaintiff is only matter for a plea in abatement. 1 Saund. 291 i (n).

Evidence on a plea of statute of limitations, &c.] On a plea of the statute of limitations to a declaration containing only counts on promises to the testator, the plaintiff will not be allowed to give evidence of promises or acknowledgments to himself after the death of the testator. *Sorell v. Wine*, 3 East, 409. ; *Tanner v. Smart*, 6 B. & C. 608. And when an executor sues on a promissory note, and lays a promise to himself, the plea of non-assumpsit is a denial of the promise so laid, but not of the making of the note. *Timmis v. Platt*, 2 M. & W. 720.

Evidence of payment.] Payment of a debt to an executor, who has obtained probate to a forged will, is a discharge in an action brought against the debtor by the rightful administrator on revocation of the probate. *Allen v. Dundas*, 3 T. R. 125. But a payment of money under the probate of a will of a living person would be void ; because, in such case, the ecclesiastical court has no jurisdiction, and the probate can have no effect ; *Id.* 130. ; and see *Woolley v. Clark*, 5 B. & A. 744.

Evidence in action by a rightful against a wrongful executor.] In an action of trover or trespass by a rightful executor or administrator against an executor *de son tort*, the latter may, under the general issue and in mitigation of damages, give evidence of payments made by himself in the rightful course of administration ; but should those payments amount to the full value of the goods claimed, the plaintiff will still, it seems, be entitled to a verdict for nominal damages. *Mountford v. Gibson*, 4 East, 447. ; 2 Phil. Evid. 175. But see *B. N. P.* 48. And such payments shall not be allowed in damages, if there be a failure of assets, and the lawful executor would by these means be divested of his right of preferring one creditor to another of equal rank, or giving himself the same preference. 2 Bl. Com. 508. ; 1 Williams Exors. P. 1., B. 3., Ch. 5. ; *Layfield v. Layfield*, 7 Sim. 172. Where an executor under a second will sued the person appointed executor under a prior one, who had administered with knowledge of the later one and whose probate was revoked, it was held that plaintiff might recover the full value of the goods administered. *Woolley v. Clark*, 5 B. & A. 744.

Competency of Witnesses.

As to the competency of witnesses, see *antè*, p. 113, 114., and the late statute, Appendix IV.

ACTIONS AGAINST EXECUTORS AND ADMINISTRATORS.

An action at law cannot be maintained for the distributive share of an intestate's property against the administrator, nor against his executor, although he may have expressly promised to pay. *Jones v. Tanner*, 7 B. & C. 542. But where the executor has rendered an account to the legatee, in which he debits himself for the amount, "as retained for the legatee," the latter may recover on an account stated. *Hart v. Minors*, 2 C. & M. 700. So trover will lie for a specific legacy after assent by the defendant. *Williams v. Lee*, 3 Atk. 223. And assent to a life interest in a chattel enures as an assent to a further bequest in remainder; but where the executor has such life interest bequeathed to him, his taking possession shall be presumed to be as executor, and not as legatee, if assenting to the legacy would be a *devastavit*. *Richards v. Browne*, 3 New Ca. 493.

Evidence on the plea of ne unques executor.] If the defendant intends to deny his being executor or administrator, he must plead it specially, for unless pleaded, his representative character is admitted. The proof of the issue on this plea lies upon the plaintiff, and he may support it by production of the probate or letters of administration, or by secondary evidence of them, after a notice to produce served upon the defendant; in such case, as the presumption of law is that the probate or letters are in the possession of the party who is alone entitled to them, it is not necessary to give any evidence in order to show that they are in the defendant's possession. Some proof of the identity of the defendant with the person named as executor in the probate must be given.

The plea of *ne unques executor* does not deny the cause of action, but only that the defendant is one of the representatives of the testator. 1 *Saund.* 207 a. (n).

Upon the plea of *ne unques executor* it is sufficient to give evidence of such circumstances as will render the defendant liable as *executor de son tort*. What acts will make a man an *executor de son tort* is a question of law; but it is for the jury to say whether such acts are proved. *Padget v. Priest*, 2 T. R. 97. Evidence of slight acts of intermeddling with the property of the deceased will be sufficient. In one case, merely taking a book, and in another a bedstead, was held sufficient. *Anon. Noy*, 69. So living in the house and carrying on the trade of the deceased; *Hooper v. Summersett*, *Wightw.* 16.; suing for, receiving, or releasing the debts due to the estate; *Com. Dig. Administrator*, (C. 1.); entering on a lease or term for years; *Bac. Ab. Executors*, B. 3.; pleading any other plea than *ne unques executor* to an action brought against him as executor, *ibid.*; will be evidence to prove the party an *executor de son tort*. So where A., the servant of B., sold goods of C., an intestate, both before and after C.'s death, in pursuance of orders given by C. in his lifetime, and paid the money arising from such sale into the hands of B., it was held that B. was an *executor de son tort*. *Padget*

v. Priest, 2 T. R. 97. And where a creditor took an absolute bill of sale of the goods of his debtor, but agreed to leave them in his possession for a limited time, before the expiration of which time the debtor died, and the creditor took and sold the goods, it was held that the bill of sale was fraudulent against other creditors, and that he had thereby rendered himself *executor de son tort*. *Edwards v. Harben*, 2 T. R. 597. Merely locking up the goods of the deceased; directing the funeral in a manner suitable to the estate, and out of the effects of the deceased; feeding his cattle; repairing his houses, or providing necessaries for his children,—will not render the party liable as *executor de son tort*; for they are merely offices of kindness and charity. *Williams on Executors*, P. 1., B. 3., Ch. 5. Where the widow of a hairdresser continued in the house and shop after his death, without selling anything, and gave a promissory note to a creditor of her husband, and afterwards took out administration; held, that she could not be charged as *executrix de son tort*. *Serle v. Waterworth*, 4 M. & W. 9.

In answer to the evidence adduced to prove him *executor de son tort*, the defendant may shew that he took possession of the intestate's goods under a fair claim of right; *Fenings v. Jarrat*, 1 Esp. 335.; *Com. Dig. Administrator*, (C. 2.); or that he acted under the authority of the rightful administrator; but it is no defence that he acted as the agent of one named executor, who has never proved the will. *Cottle v. Aldrich*, 4 M. & S. 175. It is doubted whether there can be an *executor de son tort* while there is a lawful executor in being. *Hall v. Elliot*, *Peake Ca.* 87.; *Read's case*, 5 Co. 34 a.

In assumpsit against several defendants, as executors, who plead *ne unques executors*, the plaintiff may have a verdict against the real executors on the counts laying the promises by the testator, and the other defendants must be discharged; *Griffiths v. Franklin*, M. & M. 146.; and the plaintiff cannot recover on counts upon promises by all the defendants as executors. *Ibid.*

Evidence on plene administravit; proof of assets.] Where the defendant pleads *plene administravit*, and the plaintiff replies that the defendant had assets, the issue lies upon the plaintiff, who must prove assets existing at the time of the writ sued out. *Mara v. Quin*, 6 T. R. 10. If the assets came to the hands of the defendant after the writ sued out, the plaintiff should reply that fact specially, and will not be allowed to give it in evidence under the general replication. *Id.* 11. Proof that certain articles of furniture were bought by the deceased and seen in his house shortly before his death, is *prima facie* evidence of assets. *Britton v. Jones*, 3 New Ca. 676. In order to prove assets, the plaintiff may give in evidence the inventory exhibited by the defendant in the ecclesiastical court; but a copy of the inventory, signed by the appraisers and not by the executors, is not evidence. *B. N. P.* 140. Where the defendant has not distinguished the separate from the desperate debts in the inventory, it has been held that the whole shall, *prima facie*, be taken to be assets, so as to throw the onus of proving some of them desperate upon the defendant. *B. N. P.* 140; *Smith v. Davis*, *Sofa. N. P.* 712. But in another case Lord Ellenborough ruled, that it was necessary to prove, presumptively at least, that these debts have been paid. *Giles v. Dyson*, 1 Stark. 32. It is not every inventory that will be proof of assets: thus the inventory exhibited by an executor before

probate, which he makes out without full examination of the property, and in which he is bound to include all the effects of the testator, is not even *prima facie* evidence of assets. *Stearn v. Mills*, 4 B. & Ad. 657. Where, to prove assets, an account rendered by the defendants to the plaintiff was given in evidence, in which they stated that a sum of money had been awarded as due to the testator's estate, Lord Ellenborough held that this was not sufficient without shewing that it had been received by the executors. *Williams v. Innes*, 1 Camp. 364. If an executor submits to arbitration, such submission is not an admission of assets; the arbitrators not directing the executor to pay the money. *Pearson v. Henry*, 5 T. R. 6. But a submission to arbitration and an agreement to pay what shall be awarded, with an award to pay accordingly, is an admission of assets to the amount of the sum so awarded. *Barry v. Rush*, 1 T. R. 691.; *Worthington v. Barlow*, 7 T. R., 453. Proof of an admission by an executor that the debt was just, and that it should be paid as soon as he could, is not evidence to charge him with assets. *Hindsley v. Russell*, 12 East, 232. So the payment of interest upon a bond of the testator is not an admission of assets. *Cleverley v. Brett*, cited 5 T. R. 8. But a probate stamp has been held to be *prima facie* evidence that the executor has received assets to the amount covered by the stamp. *Foster v. Blakelock*, 5 B. & C. 328. This case was, however, doubted in *Stearn v. Mills*, 4 B. & Ad. 657. *supra*. In *Mann v. Lang*, 3 A. & E. 699., the court were of opinion such stamp was admissible evidence for the plaintiff; but were not agreed whether it could be received as evidence of the amount of assets. An administrator *bona fide* compounding with a debtor to the estate is not liable to the full amount of the debt compounded, as he is where he releases it without consideration. *Pennington v. Healey*, 1 C. & M. 402.

Where leasehold premises are the assets, the value as between the lessor and the lessee's executor is to be taken exclusive of deterioration for want of repair, or other breach of covenant committed in the executor's time; and the insolvency of an under-tenant, let in by the testator, cannot be taken into consideration, at least where there is a clause of re-entry in the underlease for non-payment of rent. *Hornidge v. Wilson*, 11 A. & E. 645. In the above case the action was for rent against the executor, as assignee of the testator.

Though the plea of *plene administravit* in an action of assumpsit against an executor admits a cause of action, it does not admit the amount, which must be proved by the plaintiff; but in an action of debt in which a specific sum is demanded, the specific debt is admitted, and need not be proved. *Shelley's case*, 1 Salk. 296; *B. N. P.* 140.

On a plea by several executors that they have fully administered, if some appear to have assets in their hands, and the others not, the latter are entitled to a verdict; *Parsons v. Hancock*, *M. & M.* 330; although they join in the plea. See 2 *Williams on Executors*, 1219.

Evidence on plene administravit in answer to proof of assets — payment of debts.] When the plaintiff has given evidence of assets, the defendant, in answer to such evidence, may prove that those assets have been exhausted by payment of other debts of the deceased of as high, or of higher, degree than the debt of the plaintiff, provided such payments were made before the writ purchased. When the defendant pleads "no

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assets," without the averment of *plene administravit*, yet he must shew the payment of assets by a due course of administration. *Reeves v. Ward*, 2 New Ca. 235.

The course of distribution is as follows : 1. All funeral expenses, and the charges of proving the will, or of taking out letters of administration ; and the defendant may shew that he has retained money in his hands to pay for the expenses of administration to which he has made himself liable, without proving that he has paid them. *Gillies v. Smither*, 2 Stark. 528. 2. Debts due to the crown by record or specialty. 3. Certain debts created by particular statutes. 4. Debts of record, if docketed according to statute 4 & 5 W. & M. c. 20. ; otherwise they only rank as simple contract debts. *Hickey v. Hayler*, 6 T. R. 384. 5. Debts due by specialty, and rent. 6. Debts due by simple contract, first to the king, and secondly to a subject. *Com. Dig. Administration*, (C. 2.)

The expenses of the funeral, if reasonable and suited to the rank and circumstances of the deceased, will be allowed out of the assets ; if unreasonable, the executor must take his chance of the estate turning out insolvent. *Edwards v. Edwards*, 2 C. & M. 612. And he will be liable to reasonable expenses, even although he did not actually order the funeral, provided the credit was not given to another ; and if he has authorised unreasonable expenses, he is liable personally, and not merely as executor ; *Brice v. Wilson*, 8 A. & E. 349. (n) ; and an administrator is liable as such even where he has sanctioned them before he took out administration. *Lucy v. Wakond*, 3 New Ca. 841.

If the defendant has paid debts to the amount after the suing out, but before notice of, the plaintiff's writ or debt, he must plead such defence specially, and cannot give it in evidence under *plene administravit*, under which no payments made after the action commenced can be shewn. *Dyer*, 32. (a). (margin) ; *Com. Dig. Administration*. (C. 2.) An executor *de son tort* may pay a specialty debt after action brought by a simple contract creditor, and may plead the payment of that debt in bar of the action. *Ozenham v. Clapp*, 2 B. & Ad. 309.

Where the action is brought on a bond of the deceased, and the defendant pleads *plene administravit* and relies upon the payment of other bonds of the deceased, the execution of such bonds must be proved in the usual manner, even though the bonds have been destroyed. *Gillies v. Smither*, 2 Stark. 530. ; see *Poole v. Warren*, 8 A. & E. 582., *antè*, p. 95. Where, however, the defendant, being sued in assumpsit on a simple contract, pleads *plene administravit* and relies upon the payment of bonds of the deceased, it will be sufficient, it is said, to prove the payment ; *B. N. P.* 143. ; for, though not a bond, it is yet a good administration ; see *antè*, p. 94.

Where defendant shews payment of debts, &c., plaintiff may show on this issue that the payment was made out of another fund applicable to such debts, and not out of the assets. *Marston v. Downes*, 1 A. & E. 31. In debt on bond to which defendant pleaded *plene administravit* before notice, it was held that if the defendant had invested the residue in the funds in his own name, although for the benefit of the legatees to whom he had paid the dividends for many years, he was still liable as for assets in hand ; and it was questioned whether payment of legacies before notice could be proved under the plea of *plene administravit*. *Smith v. Day*, 2 M. & W. 684.

Though a creditor may so mislead an executor as to preclude himself from objecting to the course of administration, yet a letter written to the latter, intimating an intention to hold him liable personally and not as executor, is insufficient for this purpose. *Richards v. Browne*, 3 *New Ca.* 493.

Evidence on plene administravit — retainer.] The defendant may either plead a retainer of a debt due to him (which must be a debt of an equal or higher degree than the debt for which the action is brought, in order to entitle the defendant to retain it), or may give it in evidence on the plea of *plene administravit*. 1 *Saund.* 333. (n). So the defendant may retain for payments which he has made out of his own monies before the issuing of the writ in discharge of debts of the deceased of equal or higher degree than the plaintiff's. *Co. Litt.* 283 a.; *B. N. P.* 141.

An executor *de son tort* cannot retain for his own debt, though of higher degree, and though the rightful executor after action brought has consented to the retainer. *Curtis v. Vernon*, 3 *T. R.* 587. *S. C. in Error*, 2 *H. Bl.* 18. In answer to such evidence of retainer, the plaintiff may shew who are the rightful executors. *B. N. P.* 143. Where the defendant pleads a retainer, and also a judgment recovered, which together cover the assets, it is sufficient for the plaintiff to falsify either claim. *Campion v. Bentley*, 1 *Esp.* 344.; see 1 *Freem.* 467. 537. One of two executors may retain for his own debt out of a balance due from both to the estate. *Kent v. Pickering*, 2 *Keene*, 1.

Evidence on a plea of outstanding debts — replication per fraudem.] The defendant cannot, under the plea of *plene administravit*, give evidence of the existence of outstanding debts of a higher nature. *B. N. P.* 141. Such defence must be pleaded; and if the defendant pleads a judgment obtained against him for 100*l.* and that he has not goods except to the value of 5*l.*, and the plaintiff proves that he has 100*l.*, yet he gains nothing; for the substance of the issue is that the defendant has not above what will satisfy the judgment. *Moon v. Andrewes*, *Hob.* 133.; 1 *Saund.* 333. (n).

Where the defendant pleads an outstanding judgment, the plaintiff may reply that it was obtained or kept on foot by fraud, which the defendant is bound to traverse in his rejoinder; and on this issue the plaintiff may either give in evidence that the debt was not a just one, or that less is due than the sum for which judgment has been given. 2 *Saund.* 50. (n). In answer to the latter evidence, which is *prima facie* proof of fraud, the defendant may shew that the judgment was entered for more than was due by mistake. *Pease v. Naylor*, 5 *T. R.* 80. If a judgment is pleaded and *per fraudem* replied, upon which issue is taken, and it appears in evidence that the creditor was willing to take less than is recovered, it is proof of fraud; but if it be shewn that the administrator had not assets to pay that sum, it is no fraud. *Per Cur. Parker v. Alfeld*, 1 *Salk.* 312. If the defendant plead several judgments recovered against himself, to which the plaintiff replies fraud, it will entitle the plaintiff to a general judgment if he can avoid any one of them; for a judgment recovered against an executor being an admission of assets, if any one of the judgments be falsified, the defendant admits by his plea that he has more assets than will satisfy the other judgments by as

much as the judgment, so falsified, amounts to. 1 *Saund.* 337 a (n). See *Chamberlaine v. Pickering*, 1 *Freeman*, 28. ; *Gilbert v. Dee*, *ib.* 537. When the judgments, or debts pleaded, are upon penalties, the right way of replying is to say that the creditor would have accepted the less sums, but the defendant either would not pay, or had paid them and kept the judgments or bonds on foot by fraud and covin ; and the plaintiff, on issue joined thereon, may give in evidence such matter as will serve to avoid the penalties. If he replies, generally, that the judgments were for less sums, and that the defendant has assets above what will satisfy them, on the issue that he has not, the defendant has a right to insist on the *penalties* as the debts. 1 *Saund.* 334. (n).

An executor may confess a judgment to a creditor in equal degree with the plaintiff pending the action, and plead it in bar ; and, though done for the express purpose of depriving the plaintiff of the debt, it is good both at law and in equity. 2 *Saund.* 51. (n) ; *Pickstock v. Lyster*, 3 *M. & S.* 375.

Where the defendant pleaded a judgment recovered, and the plaintiff replied that it was obtained and kept on foot by fraud, the judgment creditor was held incompetent to prove that the debt was a fair one ; for by establishing the validity of his own debt, he made good his priority of claim to be paid out of the assets of the intestate. *Campion v. Bentley*, 1 *Exp.* 343. See cases cited, *antè*, p. 113.

Evidence on plea of statute of limitations—promise by one executor.] The plaintiff cannot shew a promise by the executor to take a case out of the statute, unless the declaration lays a promise by him ; and a mere acknowledgment of the existence of the debt is not sufficient. There must be an express promise, and, where there are several executors co-defendants, there must be a promise by all. *Tullock v. Dunn*, *R. & M.* 416. And now by 9 Geo. 4. c. 14., the promise must be in writing, but the plaintiff may recover against any one or more of the executors who has made such promise ; provided, however, that nothing in that act shall lessen the effect of any payment of principal or interest, *r. l. antè*, p. 315. ; and see, as to admissions by a co-executor, *Fox v. Waters*, cited, *antè*, p. 41.

Evidence in an action suggesting a devastavit.] If an executor, or administrator, in an action brought against him as such, admit assets by his pleading, he will not, in an action of debt on the judgment suggesting a *devastavit*, be allowed to show that he has not assets ; and it will be sufficient for the plaintiff, upon issue on the plea of *non devastavit*, to prove the former judgment and the return of *nulla bona* to the *feri facias*. *Erving v. Peters*, 3 *T. R.* 685. ; *Stelton v. Hawling*, 1 *Wils.* 259. Where the defendant pleads *non est factum testatoris*, or a release to the testator, or payment by him, or *non assumpsit*, these pleas admit assets. 1 *Saund.* 335. (n). So a judgment for the plaintiff on demurrer, or by default, will be evidence of assets ; *Rock v. Leighton*, 1 *Salk.* 310 ; though no *devastavit* has been returned by the sheriff. *Leonard v. Simpson*, 2 *New Ca.* 176. ; see also *Palmer v. Waller*, 1 *M. & W.* 689.

ACTIONS AGAINST HEIRS AND DEVISEES.

An action of debt on the specialty of the ancestor lies at common law against the heir, if named in the deed. *Co. Litt.* 209. (a). The remedy was extended, by 3 & 4 W. & M. c. 14., to devisees, and has been since extended to actions of covenant by 11 Geo. 4. & 1 Wm. 4. c. 47. The latter statute is now the governing statute on the liability of heirs and devisees.

The evidence in actions against an heir, or heir and devisee jointly, or the devisee alone, depends on the plea and issue. Besides the other defences pleadable in an action on a bond or covenant, &c., the defendant may deny that he is heir, or may plead that he has nothing by descent or by devise.

Evidence on plea of riens per descent.] The law of inheritance has undergone a material change by 3 & 4 Wm. 4. c. 106., partly recited *antè*, p. 433. Until the effect of it has been settled, it has been thought advisable to retain the cases decided before the passing of that act.

Upon issue joined on the plea of *riens per descent*, the execution of the bond or other specialty being admitted by the plea, the plaintiff must prove the assets by descent; and if assets are averred in a certain county, plaintiff may prove them in any other county. *B. N. P.* 175. The seisin of the ancestor may be proved by shewing that he was in possession of the lands, or in the receipt of the rents and profits, *antè*, p. 433. Where the lands have descended from the obligor to another who has died seised, and from him to the defendant, the descent must be stated specially, as that the defendant was the heir of A. who died last seised, who was the heir of the obligor; and so it must be where there have been several intermediate descents; for if the declaration be against the defendant, as heir of the obligor, and it appear in evidence on the plea of *riens per descent* from the obligor, that the defendant is heir of the heir of the obligor, is a fatal variance. 2 *Saund.* 7 d (n). *Jenks's case*, Cro. Car. 151. It seems therefore that the plea of *riens per descent* does not admit the heirship, which must be proved. But if the intermediate heirs have not had *actual seisin* of the fee which descended from the obligor, it is unnecessary to notice them in the declaration. 2 *Saund.* 7 d (n), *Kellow v. Rowden*, Carth. 126. It is sufficient in the declaration to charge the defendant as heir generally, without stating how heir, and the plaintiff may shew how heir in evidence. *Denham v. Stephenson*, 1 *Salk.* 355.

On this issue the defendant may shew a bond to the king by his ancestor, and an extent thereon to the amount of the assets; but proof of the extent alone is not sufficient. *Sherwood v. Adderley*, 1 *Ld. Raym.* 734. And when the defendant has paid another bond creditor to the value of the land descended, he should plead it. *Buckley v. Nightingale*, 1 *Str.* 665.

Evidence on plea of riens per descent—what are assets.] It is a general rule of the common law that though the ancestor devise the estate to his heir, yet if he take the same estate in quality and quantity that the law would have given him, the devise is a nullity, and the heir is seised by descent, and the estate assets in his hands. 2 Saund. 8 d (n). *Reading v. Royston*, 1 Salk. 242. So where the land is devised charged with the payment of a sum of money; *Clerk v. Smith*, 1 Salk. 241.; or of debts; *Allan v. Heber*, 2 Stra. 1270. So a rent in fee, issuing out of the heir's land, and descending to him; though extinct; for it has continuance for this purpose. *Co. Litt.* 374 b. But this rule of law is now altered by 3 & 4 Wm. 4. c. 106., cited *anté*, p. 436.

If there be a mortgage for years, the reversion in fee in the mortgagor is legal assets, and the plaintiff may have judgment with a *cesset executio*; but where there is a mortgage in fee, the equity of redemption is not legal assets. 2 Saund. 8 c (n), *Plunket v. Penson*, 2 Atk. 294. So a copyhold in fee is not assets. 4 Rep. 22 a. By the statute of frauds, 29 Car. 2. c. 3. s. 12., an estate *pur autre vie*, which comes to the heir as special occupant, is made assets by descent. Lands which descend in tail are not assets. 1 Roll. Ab. 269. (B.) A reversion expectant on an estate tail is not assets, upon the general issue of *riens per descent*. *Mildmay's case*, 6 Rep. 42 a; *Kellow v. Rowden*, Carth. 129. *Sed vide*, 12 Vin. 186., that it should be specially pleaded. A reversion after an estate for life is *quasi assets*, but it ought to be pleaded specially by the heir, and the plaintiff may take judgment *quando acciderit*. *Ibid.* *Dyer*, 373. b.

If the defendant pleads *riens per descent*, and the jury find that he has something, however small it may be and insufficient to discharge the debt, the plaintiff is entitled to a general judgment for the debt, damages, and costs, and to sue out the like execution against him as on a judgment for his own debt. 2 Saund. 7 a (n). It is, therefore, unnecessary to prove the value of the assets descended. *B. N. P.* 176.

Evidence on plea of riens per descent—replication under stat. 11 Geo. 4., & 1 Wm. 4. c. 47. s. 7.] At common law, if the heir had *bonâ fide* alienated the lands which he had by descent before an action was commenced against him, he might discharge himself by pleading that he had nothing by descent at the time of suing out the writ or filing the bill, and the obligee had no remedy at law; 2 Saund. 7 c (n); though under this issue he might shew that the heir had alienated the lands by covin. *Ibid.* *Dyer*, 149. (a.) margin. But this is now altered by statute.

By 11 Geo. 4. & 1 Wm. 4. c. 47. s. 7., where any action of debt or covenant upon any specialty is brought against any heir, he may plead *riens per descent* at the time of the writ brought, and the plaintiff may reply that he had lands, tenements, or hereditaments from his ancestor before the writ brought; and if, upon the issue joined thereupon, it be found for the plaintiff, the jury shall inquire of the value of the lands, &c. so descended, and thereupon judgment shall be given, and execution shall be awarded, &c.

This section corresponds with s. 5. of the former statute, 3 & 4 W. and M. c. 14. When issue is joined on this replication (which may, it seems, be pleaded, though the heir has not alienated the lands; 2 Saund. 8 n) the plaintiff, in addition to the usual proofs under the plea of

riens per descent, must be prepared with evidence of the gross, not the annual, value of the lands descended, for if the jury neglect to find the value, the court will award a *venire de novo*. *Jeffry v. Barrow*, 10 *Mod.* 18. *Brown v. Shuker*, 1 *C. & J.* 583.

Evidence in action against heir and devisee.] At common law, if the ancestor had devised the lands, a bond creditor had no remedy against the devisee. But this is now remedied by the second section of the new statute, which is a re-enactment of the 3 & 4 W. & M. c. 14. s. 2. Until the late statute an action of *covenant* did not lie against a devisee; *Wilson v. Knubley*, 7 *East*, 128. But now see 11 *Geo.* 4. & 1 *W.* 4. c. 47. ss. 2. and 3. The act 3 & 4 W. & M. was held not to extend to any settlement or disposition made by the obligor by *deed* in his lifetime. *Parslowe v. Weedon*, 1 *Eq. Ab.* 149., 2 *Saund.* 8 c (n). Nor could the devisee alone be sued. *Hunting v. Shelldrake*, 9 *M. & W.* 256.

ACTIONS AGAINST HUNDREDORS, &c.

The statutes of Winton, the Riot Act, the Black Act, and other statutes relating to remedies against the hundred, were repealed by 7 & 8 *Geo.* 4. c. 27., and their provisions have been partially restored, with considerable amendments, by 7 & 8 *Geo.* 4. c. 31. This last statute took effect on the 1st of July, 1827. The following are the only clauses of it that are applicable to the purpose of the present work.

By section 2., it is enacted, that if any church or chapel, or any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered or recorded, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam-engine or other engine for sinking, draining, or working any mine, or any staulh, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, shall be feloniously demolished, pulled down, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together, in every such case the inhabitants of the hundred, wapentake, ward, or other district in the nature of a hundred, by whatever name it shall be denominated, in which any of the said offences shall be committed, shall be liable to yield full compensation to the person or persons damnified by the offence, not only for the damage so done to any of the subjects hereinbefore enumerated, but also for any damage which may at the same time be done by any such

offenders to any fixture, furniture, or goods whatever, in any such church, chapel, house, or other of the buildings or erections aforesaid.

Section 8. provides, that no action or summary proceeding shall be maintainable by virtue of that act for the damage caused by any of the said offences, unless the person or persons damaged, or such of them as shall have knowledge of the circumstances of the offence, or the servant or servants who had the care of the property damaged shall, within seven days after the commission of the offence, go before some justice of the peace residing near and having jurisdiction over the place where the offence shall have been committed, and shall state upon oath before such justice the names of the offenders, if known, and shall submit to the examination of such justice touching the circumstances of the offence, and become bound by recognizance before him to prosecute the offenders when apprehended: provided also, that no person shall be enabled to bring any such action, unless he shall commence the same with three calendar months after the commission of the offence.

By section 8. no person shall commence any action against the inhabitants of any hundred, &c., where the damage alleged to have been sustained shall not exceed the sum of thirty pounds.

By section 11. every action or summary claim to recover compensation for the damage caused to any church or chapel by any of the offences in that act mentioned, shall be brought in the name of the rector, vicar, or curate of such church or chapel, or in case there be no rector, &c., then in the names of the church or chapel wardens, if there be any such, and if not, in the name of any one or more of the persons in whom the property of such chapel may be vested; and where any of the offences in this act mentioned shall be committed on any property belonging to a body corporate, such body may recover compensation against the hundred, &c., in the same manner, and subject to the same conditions, as any person damaged is by that act enabled to do; provided that the several conditions therein-before required to be performed by or on behalf of any person damaged, may, in the case of a body corporate, be performed by any officer of such body on behalf thereof.

By section 12., reciting that the offences for which compensation is granted by that act may be committed in counties of cities and towns, or in such liberties, franchises, cities, towns, and places, as either do not contribute at all to the payment of any county rate, or contribute thereto but not as being part of any hundred or other like district; it is enacted that where any of the said offences shall be committed in a county of a city or town, or in any such liberty, franchise, city, town, or place, the inhabitants thereof shall be liable to yield compensation in the same manner, and under the same conditions and restrictions in all respects as the inhabitants of the hundred; and every thing in this act in any way relating to a hundred, or to the inhabitants thereof, shall equally apply to every county of a city or town, and to every such liberty, franchise, city, town, and place, and to the inhabitants thereof; and where the justices of the peace of the county, riding, or division, are excluded from holding jurisdiction in any such liberty, franchise, city, town, or place, in every such case all the powers, authorities, and duties by that act given to or imposed on such justices, shall be exercised and performed by the justices of the peace of the liberty, &c.; and where the offence shall be committed in a county of a city or town,

all the like powers, &c., shall be exercised by the justices of the peace of such county of a city or town.

From the above extract it will appear, that the remedy given by the statute of Winton against the hundred in the case of robbery, and by the Black Act in the case of certain malicious injuries to property unaccompanied by riot, is abolished.

The remedy against the hundred is extended by the statute 3 & 3 W. 4. c. 72. to *threshing machines* feloniously cut, broken, damaged, or destroyed by any persons riotously and tumultuously assembled together, in which case the inhabitants of the hundred, &c., shall be liable to yield full compensation to persons damaged by the offence, not only for the damage done to any such machines, but also for any damage which may at the same time be done by any such offenders to any erection or fixture whatever in or about or belonging to any such machines.

The plea of "Not guilty" was sufficient, until the New Rules of pleading, to put in issue all the allegations in the declaration. — Since the New Rules the practice has been to specify the precise objection to the plaintiff's right of recovery by a traverse or special plea. The effect of the general issue has not been settled by any reported case.

The plaintiff may be called upon, and must be prepared, to prove, 1, his interest in the property injured; 2, the offence; 3, that it was committed within the hundred, &c., 4, the examination of himself or servant, agreeably to the statute; 5, the recognisance to prosecute; 6, the amount of damage; 7, the commencement of the action within three calendar months.

Many of the cases cited hereafter are decisions on the old statutes, but are applicable to the recent act.

Interest of the plaintiff.] The bare trustee of a satisfied term is entitled to sue for damages. *Pritchit v. Waldron*, 5 T. R. 14. (Riot Act.) Parties jointly interested in the property may join in the action. *Winterstoke Hundred's case*, *Dyer*, 370. (a). (Statute Winton.) Where the property injured consists of a church or chapel, or belongs to a corporation, the 11th section of the act points out the parties who are to sue. A reversioner may sue for the damage sustained by him, *Pellew v. Wonford*, 9 B. & C. 134.; though the hundred may thereby be subjected to several actions. *S. C.* 142. (Black Act). One of two lessees may recover according to his share of interest. *Lowe v. Broxtowe*, 3 B. & Ad. 558.

The offence.] By 7 & 8 Geo. 4. c. 30. s. 8. it is enacted, that if any persons riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or *begin* to pull down, demolish, or destroy any church or chapel, or any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered or recorded; or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-nast, barn or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof; or any machinery, whether fixed or moveable, prepared for or

employed in any manufacture, or any branch thereof; or any steam-engine or other engine for sinking, draining, or working any mine; or any staith, building or erection used in conducting the business of any mine; or any bridge, waggon-way, or trunk for conveying minerals from any mine; every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.

As this section corresponds almost verbally with the section of 7 & 8 Geo. 4. c. 31., which gives the action against the hundred, it is presumed that, in order to entitle the party to that remedy, the offence must be a felony within the above clause. See *Reid v. Clarke*, 7 T. R. 496. (Riot Act.) The 38th section of 57 Geo. 3. c. 19., which extended the remedy to all cases of injury to buildings by rioters, is repealed by 7 & 8 Geo. 4. c. 27.; so that where the injury is partial, it will be a matter of inquiry (as formerly under the Riot Act) whether the acts of the rioters constitute a "beginning to demolish" within the above clause. The following cases were decided on the Riot Act.

Where a riotous mob broke the windows, sashes, and shutters of a house in order to compel the occupier to illuminate, this was held not within the act. *Reid v. Clarke*, *supra*. It is a question for the jury whether the rioters intended to stop short of demolition, or to proceed to further acts to effect their purpose. *Burrows v. Wright*, 1 East. 615. During the riots respecting the corn bill, the mob attacked the plaintiff's house, and proceeded to break his windows, shutters, fanlight over his doors, &c., when the military appeared and dispersed them: held sufficient evidence of a beginning to demolish. *Sampson v. Chambers*, 4 Camp. 221. On the same occasion, where the mob voluntarily retired after doing similar mischief to the plaintiff's house, the jury, under the direction of Lord Ellenborough, found for the defendants. *Lord King v. Chambers*, *ib.* 377. A mob attacked the plaintiff's house with intent to liberate a comrade in custody there, and did many acts of violence to the property: *per* Lord Ellenborough, "The question is, what was the purpose of the mob, and whether, if they could not have rescued their leader, they would not have proceeded to demolish the house, as they threatened, unless his escape had intervened. It is a principle of law, that a person intends to do that which is the natural effect of what he does. If therefore the pulling down the house was intended as a means of getting at him, they intended to demolish the house." *Beckwith v. Wood*, 2 Stark. 263. See also *Smith v. Bolton*, *Holt's N. P. C.* 203.; *R. v. Thomas*, 4 C. & P. 237.; *Price's case*, 5 C. & P. 510. The case may fall within the statute, though the intent to demolish may be accompanied with another intent which may have influenced the conduct of the rioters. Thus where a party of coal-whippers, having a feeling of ill-will towards a coal-lumper who paid less than the usual wages, collected a mob, and went to the house where he kept his pay table, exclaiming, that they would murder him, and began to throw stones, &c., and broke the windows and partitions, and part of a wall, and after his escape, continued to throw stones, &c., till stopped by the police; Gurney B. ruled that the parties might be convicted under the 7 & 8 Geo. 4. c. 30. s. 8., of beginning to demolish, though their principal object might be to injure the lumper, provided it was also their object to demolish the house, on account of its having been used by him. *R. v. Batt*, 6 C. & P. 329.

On the 57 Geo. 3. c. 19., where the words are "house, shop, or other

buildings whatever," the Court of King's Bench held that hustings, erected to take elections, were not within the description. *Allen v. Ayre*, 3 D. & R. 96.

Committed within the hundred, &c.] The offence must be proved to have been committed within the hundred or other district or place named in the declaration, and which must be one of the different classes of places enumerated in the 2d or 12th section. Where a distinct hundred is called the "half hundred" or "upper hundred" of A., and the action is brought against the hundred of A., the plaintiff must be nonsuited, 2 *Saund.* (*Williams*) 375 b. n (3), citing *Constable's case*, *Hob.* 246. (stat. Winton.) But if the half hundred of A. be in fact only part of hundred A., the defendant must, it is said by Serj. Williams, plead in abatement. *Ibid.* But the case in Hobart says the matter must be pleaded "or given in evidence." The action lies against the hundred, though the offence was committed within a borough which, since 5 & 6 W. 4. c. 76. (Municipal Corporation Act) is only partially contributory to the county rate. *Birley v. Salford*, 11 M. & W. 391.

Examination of party, &c.] See s. 3. of stat. *supra*, 587. The seven days ought, it seems, to be reckoned exclusively of the day on which the offence was committed. *Pellew v. Wonford*, 9 B. & C. 134. (Black Act.) The words of the Black Act, 9 Geo. 1. c. 22., differ slightly from those of the above statute, and are as follow: "No person or persons shall be enabled to recover, &c., unless he or they shall within four days, &c. give in his, her, or their examination upon oath of his, her, or their servant or servants that had the care of his or their houses, &c." On this clause it has been decided, that where the premises injured are under the care of several servants, they should *all* be examined. *Duke of Somerset v. Merc*, 4 B. & C. 167. Where a tenant quitted the premises during the hay harvest, and the steward of the *lessor*, living at a distance, directed certain persons to get in the hay, who took possession of the farm for this purpose, and carried on their work under the superintendence of an under-steward, it was held that these latter, and not the steward, were the persons to be examined. *S. C. ibid.* The servant who has the *general* care of the property is the proper person to be examined, although other servants may have the special care of particular parts of it. *Lowe v. Broxtowe*, 3 B. & Ad. 550. It is enough that the party should *present himself* for examination if the justice shall think proper. *Per* Lord Tenterden C. J., *ib.* 564. Where the reversioner sued, his own oath was held sufficient without examining the tenant or his servants. *Pellew v. Wonford*, *supra*. It is unnecessary to examine both servants and owner; if the latter is in residence, or is only casually absent for a short time, his oath is enough; but where he has no superintendence, and has left the house in the charge of servants, the latter are the proper persons to be examined. *Rolfe v. Elthorne*, M. & M. 185. On the similar clause of 52 Geo. 3. c. 130. s. 4., it was ruled that, where the premises demolished belonged to several partners, all who were present at the transaction ought to have been examined; or the affidavit of the one examined should at least negative that the rest had any knowledge of the offenders. *Nesham v. Armstrong*, 1 B. & A. 146. It may be inferred from this case, and from the dictum of Holroyd J., in *Duke of*

Somerset v. Mere, that the examination of all the owners, or all the servants, was not necessary under the former statutes, where the persons omitted were shown to be ignorant of the subject matter of inquiry. If so, the introduction of the words in the recent statute "or such of them as shall have knowledge of the circumstances of the offence," makes no material difference in its construction.

In the stat. 27 Eliz. c. 13. (Hue and Cry), the examination is to be before a "justice of the peace of the county inhabiting within the hundred, or near unto the same." Under this it has been decided that though the examining justice lived several miles off, and there were many others living nearer, it was sufficient; the act being only directory in that respect. *Lake v. Croydon*, B. N. P. 186. It was also held no objection that the examination took place, out of the jurisdiction, by a justice who was usually commorant with his family within the jurisdiction. *Helier v. Benhurst*, Cro. Car. 211. It must be observed, however, that the words of the recent act are not exactly similar to those of the statute Eliz.

Under the Black Act it was held that the plaintiff was not bound in his examination to state his *suspicion* respecting the offender. *Pellaw v. Wonford*, 9 B. & C. 134. It is unnecessary for the justice of the peace to take the examination in writing; it is sufficient for him to appear at the trial, and depose the substance of the affidavit. *Graham v. Becon-tree*, B. N. P. 186. (stat. 27 Eliz.) But if the affidavit be in writing, no other evidence of the examination shall be admitted. *Ibid.* Proof that the person who took the examination was acting as a justice of the peace is sufficient, and the affidavit may be read on proof that it was delivered to the person producing it by the justice's clerk, without proving his handwriting. *Per Parker C. J. Ibid.*

Amount of damage.] The statute entitles the plaintiff to recover compensation for damage done at the same time by the rioters to any fixture, furniture, or goods whatever, in the buildings or erections therein named, s. 3. Neither the Riot nor the Black Act contained any express provision of this kind. Yet where the injury done to personal property was the immediate effect of the act of demolition, or if the destruction of furniture, &c. and demolition of the building were parts of the same riotous transaction, and done at the same time, the plaintiff was allowed to include the whole in his damages. *Hyde v. Cogan*, 2 Doug. 699. (Riot Act.) So where, in pulling down a house, damage was done to the garden appurtenant. *Wilmot v. Herton*, *ib.* 701. (n.) So where the rioters broke into a flour-seller's house and damaged the flour in the course of demolishing the house. *Greasley v. Higginbottom*, 1 East, 636. But where a distinct and substantive offence was committed by some of the mob, as where the flour (in the last case) was stolen or compulsorily parted with by the dealer at an under price; or where money, plate, &c. were missing after the riot; *Smith v. Bolton*, Holt, N. P. C. 201.; or where the mob broke into a gunmaker's, and carried away the arms for their own use, *Beckwith v. Wood*, 1 B. & A. 487.; in these cases the hundred was held not liable. And such, it is apprehended, still continues to be the law, notwithstanding the words of additional liability inserted in the present act.

Where the damage, alleged to have been sustained, does not exceed 30*l.* no action lies; see s. 8., *antè*, p. 587.

Commencement of the action.] Where the commencement of the action did not appear by the record to have been within three calendar months, the plaintiff was bound to produce a copy of the writ; 2 *Strand*, 375 & n. (3); but the commencement now always appears on the Nisi Prius record. In *Norris v. Gawtry*, *Hob.* 139. (stat. Winton) the day of committing the offence was included in the computation. But this seems at variance with the later case of *Palkin v. Worsford*, 9 *B. & C.* 134.

Competency of witnesses.] Inhabitants of the hundred, district, &c. are not exempted or precluded from giving evidence on either side by reason of any interest arising from such inhabitancy. (sect. 5.)

ACTIONS AGAINST JUSTICES.

In an action against a justice of the peace, the plaintiff, in addition to his other proofs, must prove the delivery of a notice under 24 Geo. 2. c. 44.; the commencement of the action in proper time; and (in certain cases) malice and want of probable cause.

By 24 Geo. 2. c. 44. s. 1., no writ shall be sued out against, nor any copy of any process at the suit of a subject shall be served on, any justice of the peace for any thing done by him in the execution of his office, until notice in writing of such intended writ or process shall have been delivered to him, or left at the usual place of his abode by the attorney or agent for the party who intends to sue or cause the same to be sued out or served, at least *one calendar month* before the suing out or serving the same, in which notice shall be clearly and explicitly contained *the cause of action* which such party has or claims to have against such justice of the peace; on the back of which notice shall be indorsed *the name of such attorney or agent*, together with the *place of his abode*.

By section 5. no evidence shall be permitted to be given by the plaintiff of any cause of action except such as is contained in the notice thereby directed to be given.

To what cases the statute extends.] It has been frequently observed by the courts, that the notice which is directed to be given to justices and other officers before actions are brought against them is of no use to them when they have acted within the strict line of their duty, and is only required for the purpose of protecting them in those cases where they intended to act within it, but have by mistake exceeded it. *Per* Lord Kenyon C. J., *Greenway v. Hurd*, 4 *T. R.* 553. Where a statute justifies the making an order upon a complaint, the absence of such previous complaint does not disentitle the defendant to notice. *Norris v. Smith*, 10 *A. & E.* 189. It has uniformly been held, that where a party *bonâ fide* believes, and has some colour of reason to believe, that he is

acting in pursuance of an act of parliament, he is within the protection of such a clause. See *Beghey v. Sides*, 9 B. & C. 809., and other cases, *antè*, p. 573. Therefore, where one magistrate committed the mother of a bastard child, though two magistrates only have jurisdiction in such case, he was held entitled to notice; for he intended to act as a magistrate at the time, however mistakenly. *Weller v. Toke*, 9 East, 364. So where he has authority over the subject matter of the complaint, though the place where the offence is committed is not within his jurisdiction. *Prestidge v. Woodman*, 1 B. & C. 12. So where a magistrate committed a driver for being on the shafts of a cart standing still, the act only authorising commitment for riding on them. *Bird v. Gunston*, cited in *Cook v. Leonard*, 6 B. & C. 354. Where the capacity in which the party acted is equivocal, as where a lord of a manor, being also a justice of peace, seized a gun in the house of an unqualified person, it will be presumed that he acted as a justice. *Briggs v. Evelyn*, 2 H. Bl. 114.

But where the act in question has not been done in the capacity of a justice, and cannot be referred to that character, but is wholly *diverso intuitu*, notice is not required. Thus where a justice of the peace, who was also a mayor of a borough, received a fee for granting a licence to a publican, it was held that such fee could not have been taken by him in his character of a justice, and that he was not within the statute. *Morgan v. Palmer*, 2 B. & C. 729. A disturbance took place on the liberation of a prisoner; the defendant, a magistrate, seized the plaintiff because he was going towards the prison, saying, "you are one of the rascals;" the plaintiff was no way connected with the disturbance, and the place, where he was seized, was out of sight of the disturbance. The defendant was held not to be entitled to notice. *James v. Saunders*, 10 Bing. 429. So in an action against a person to recover a penalty for acting as a justice of the peace not being duly qualified, no notice need be proved. *Wright v. Horton, Holt, N. P. C.*, 458. Accord. *Charlesworth v. Rudgard*, 1 C. M. & R. 505.

Whether the defendant acted *bonâ fide* in the belief, and had colour of reason to believe, that he was executing his duty, is a question for the jury. *Wedge v. Berkeley*, 6 A. & E. 663. But if the judge takes on himself to decide this, and nonsuits the plaintiff, and the plaintiff does not request him to leave it to the jury, the court will not set aside the nonsuit unless they are of opinion that the evidence does not warrant his direction. *Haseldine v. Grove*, 3 Gale & D. 210.

The statute extends only to actions of tort, and not to assumpsit. *B. N. P.* 24. But see cases cited *antè*, p. 574. It extends to an action brought for supposed libel in a notice given by the defendant under a statute. *Semb. Norris v. Smith*, 10 A. & E. 188.

Many cases applicable to this head have been already cited, *antè*, *Actions against Revenue Officers, &c.* p. 572.

The Highway Act 5 & 6 W. 4. c. 50. requires twenty-one days' notice of action; yet if a justice acts under it, he is entitled to a month's notice. *Riz v. Borton*, 12 A. & E. 470.

Notice—form of.] The notice must specify the *writ or process* intended to be sued out, as well as the *cause of action*. *Lovelace v. Curry*, 7 T. R. 631. A notice, that "an action on the case for false imprisonment and assault" would be brought, was held improper. *Strickland*

v. Ward, ib. (n). It is unnecessary to name all the parties to be included in the action, or to express whether it will be joint or several. *Bar v. Jones, 5 Price, 168.* So a notice to a magistrate is sufficient to warrant a writ and proceedings against the magistrate and a constable conjointly; and where such a notice was given, and the plaintiff, after a month had expired, sued out a writ against the magistrate alone, and afterwards abandoned that writ and sued out another against the magistrate and constable jointly, the notice was held sufficient. *Jones v. Simpson, 1 C. & J. 174.*

It seems that the statute does not require the Christian name of the attorney to be indorsed on the notice; at all events the initials are enough; thus where the indorsement was "T. and W. A. Williams," the names of the attorneys being *Thomas Adams Williams* and *William Adams Williams*, it was held sufficient. *James v. Swift, 4 B. & C. 681; Mayhew v. Locke, 7 Taunt. 63.* A notice endorsed by the attorney is sufficient, though signed only by the party; for no signature is necessary. *Morgan v. Leach, 10 M. & W. 558.* It has been held that the attorney may describe himself generally of the town in which he resides, as "of Birmingham;" *Osborn v. Gough, 3 B. & P. 551.*; but in *Crooke v. Currie, Tidd, 28. (n).* it was said that London, Manchester, or other such large towns, generally, would not be sufficient. A notice written by the attorney, and signed by him thus, "Under my hand at Durham," is insufficient. *Taylor v. Fenwick, cited 7 T. R. 635., and 3 B. & P. 551.* A notice describing the attorney as of "New Inn, London," which in fact is in Westminster, was held to be bad; *Stears v. Smith, 6 Esp. 138.*; but the good sense of this decision is questionable. See *Mills v. Collett, 6 Bing. 90.* It is enough to indorse the attorney's place of business, though he does not reside there. *Roberts v. Williams, 2 C. M. & R. 561.* The attorney need not be the one on the record. *S. C. ib.* If the attorney's name and place of abode are in the body instead of the back of the notice, it is sufficient; for the intent of the statute is, that the justice may be able to tender amends to the party or his attorney. *Crooke v. Curry, cited Tidd, 27. (n).*

It is sufficient if the notice specify the writ or process, and the cause of action; the form of action is not required to be set out. *Sabin v. De Burgh, 2 Camp. 196.* It should seem, however, that if it is specified, it must agree with the declaration; for where the notice was of an action on the case for false imprisonment, &c., and the action brought was trespass, the objection was held good. *Strickland v. Ward, 7 T. R. 633. (n);* see also *Aked v. Stocks, 4 Bing., 511, 512.*

Where the notice stated that a precept called a *latitat* would be issued against the defendant "for the said imprisonment and sum of money," and the declaration was for assault, battery, and imprisonment, the notice was held good; being sufficient to apprise the magistrate of the nature of the action about to be brought against him, so as to enable him to tender amends; and that the only effect, which the omission of any mention of battery in the notice could produce, would be to exclude evidence of a battery at the trial. *Robson v. Spearman, 3 B. & A. 493.* In stating the cause of action, it is sufficient to inform the defendant substantially of the cause of complaint. *Jones v. Bird, 5 B. & A. 844.* The time as well as the place of doing the act complained of should be stated; but a variance is not necessarily fatal. *Martins v. Uppcher, 3 Q. B. 662.* And the cause of action, as stated in the

notice, must not vary from that proved, though stated with needless particularity; thus, where the notice described the defendant's warrant as directed to J. Bark, and it was in fact directed to "the constable of Halifax," (which J. Bark was not,) it was held insufficient. *Aked v. Stooks*, 4 Bing. 509. The notice is not vitiated by being in the form of a declaration and unnecessarily ample, if it expresses the cause of action with sufficient clearness. *Gimbert v. Coyney*, M'Clel. & Y. 469. A threat to "take proceedings" unless the justice complies with a request of the plaintiff to give certain names, is not equivalent to notice. *Norris v. Smith*, 10 A. & E. 188.

Evidence of notice—when dispensed with.] Tender of amends does not dispense with proof of proper notice. *Martins v. Uppcher*, 1 Dowd. N. S. 555. Nor does a plea of tender and issue on the sufficiency. S. C., 3 Q. B. 662.

Evidence of notice—delivery.] The plaintiff must prove that the notice was delivered to the justice, or left at the usual place of his abode, at least one calendar month before the suing out or serving of the writ. The month excludes the day on which the notice was served and the day of issuing the writ. *Young v. Higgon*, 6 M. & W. 49. The notice may be proved by a duplicate original without giving a notice to produce; see *antè*, p. 6.; and service by the attorney's clerk is sufficient. *Morgan v. Leach*, 10 M. & W. 558.

Evidence of the commencement of the action—limitation of action.] The action must appear to have been commenced within six calendar months after the act committed. 24 Geo. 2. c. 44. s. 8.; see *antè*, p. 569, 570., tit. *Actions against Constables*. In case of a continuing imprisonment, a justice is liable to answer for such part of it, suffered under his warrant, as was within six calendar months before the action commenced. *Masscy v. Johnson*, 12 East, 67. Where the imprisonment ended on the 14th of December, it was held sufficient commencement of the action if the writ issued on the 14th of June. *Hardy v. Ryle*, 9 B. & C. 603. The plaintiff must shew that he proceeded on a writ sued out within six months after the notice, though there be a continuing cause of action; for the notice fixes him to the trespass of which he complains; therefore a second writ issued out of time must be connected by continuance with one within time. *Weston v. Fournier*, 14 East, 491. Unless the action appears by the record to be brought in proper time, the plaintiff must produce the writ, or, if it be returned, an examined copy of it; *antè*, p. 75.; *Johnson v. Smith*, 2 Burr, 964. By the Uniformity of Process Act, 2 W. 4. c. 39. s. 12., every writ bears date on the day on which it issues, and the Nisi Prius record now always specifies the date of the issuing.

Evidence of cause of action.] It must appear that the cause of action arose in the county in which the action is brought. See *antè*, p. 567. 21 Jac. 1. c. 12. s. 5. Where the defendant committed his servant for insolent disobedience, it was held that the action must be laid in the proper county; because he supposed he had a right to commit as a justice. *Holton v. Boldero*, cited *per Cur.* in 5 Bing. 339. See further the cases, *antè*, p. 573, 592.

In case of imprisonment under the warrant of a magistrate, in order to connect the magistrate with the act, a notice to produce the warrant should be served upon the defendant, if the warrant be in his possession, so as to enable the plaintiff to give secondary evidence of its contents. But if the warrant remains in the hands of the officer, the latter must be served with a *subpœna duces tecum*. The connexion between the justice and the officer may likewise be proved by shewing that the former has recognised the acts of the latter.

Evidence of malice in action brought after conviction quashed.] By 43 Geo. 3. c. 141. s. 1., in all actions against any justice of the peace on account of any conviction made by him under any act of parliament, or for any act done by him for the levying of any penalty, apprehending any party, or the carrying of any such conviction into effect, in case such conviction shall have been quashed the plaintiff, besides the value and amount of the penalty levied upon him (in case any levy shall have been made), shall not be entitled to recover any greater damages than the sum of two-pence, nor any costs of suit, unless it shall be expressly alleged in the declaration in the action (which action shall be an action upon the case only), that such acts were done maliciously; and without any reasonable or probable cause; and, by section 2., the plaintiff shall not be entitled to recover any penalty which shall have been levied, nor any damages or costs whatsoever, in case such justice shall prove at the trial that the plaintiff was guilty of the offence whereof he had been convicted, or on account of which he had been apprehended, or had otherwise suffered, and that he has undergone no greater punishment than was assigned by law to such offence.

The magistrate is protected by the statute only where there is a conviction quashed. But an informal one is enough; as where the warrant of commitment falsely recited an information on oath by T. S., which was in fact laid by T. O. *Massey v. Johnson*, 19 East, 67., post, p. 600. Where there is a want of jurisdiction, as where a statute requires that a complaint should be heard by the justice who issues the summons, and another hears and convicts, this statute is no protection. *Jones v. Gurdon*, 2 Q. B. 600. See *Baylis v. Strickland*, 1 M. & G. 591.

In an action against a magistrate for a malicious conviction, the question is, not whether there was any actual ground for imputing the crime to the plaintiff, but whether upon the hearing there appeared to be none. The plaintiff must prove a want of probable cause for the conviction, which he can only do by proving what passed upon the hearing before the magistrate when the conviction took place. The magistrate has nothing to do with the guilt or innocence of the offender, except as they appear from the evidence laid before him. *Burley v. Bethune*, 5 Taunt. 580.

Defence.

The defendant may show special matter under the general issue. See 21 Jac. 1. c. 12. s. 5., recited *antè*, p. 567.

When justices are protected by proof of a conviction, &c.] The general rule with regard to the effect of a conviction, when offered in evidence

as a justification in an action against a magistrate, has been already stated. See *ante*, p. 144, and p. 476. 478.

Where the subject matter of the conviction is not within the jurisdiction of the justice, or where it is void on its face, the conviction will be no defence in an action brought against him. Thus where a person was convicted in four several convictions for exercising his ordinary calling on a Sunday, contrary to 29 Car. 2. c. 7., it was held that, as a man could only commit one offence under the statute on the *same* day, the three latter convictions were void; and, it being an excess of jurisdiction, an action lay. *Crepps v. Durden*, *Cowp.* 640. So where a single penalty is imposed on a conviction for two offences, trespass lies for levying it. *Newman v. Bendyshe*, 10 A. & E. 11. So where a justice committed a person under the master and servant's act, 4 Geo. 4. c. 34., who had merely contracted to do roadwork, which he left unfinished. *Lancaster v. Greaves*, 9 B. & C. 628. So where a justice, who is empowered to commit after an ineffectual distress, commits in the first instance; as where the defendant had convicted the plaintiff for destroying game, and, though (as it was proved) the plaintiff had effects which might have been distrained and sufficient to answer the penalty, sent him to prison, it was held that trespass lay. *Hill v. Bateman*, 1 Stra. 710. And where the statute creating an offence gives a form of conviction, another form will be void. *Goss v. Jackson*, 3 Esp. 198. See *Painter v. Liverpool Gas Co.* 3 A. & E. 433. So a conviction by two justices under 17 Geo. 2. c. 38., upon complaint of the overseers of a parish against the late overseer for refusing to deliver over to them "a certain book belonging to the parish, called the bastardy ledger," convicting him of the said offence, and adjudging that he should be committed to the common gaol, to be safely kept until he should have yielded up "all and every books" concerning his office of overseer belonging to the parish, was held void as to the adjudication respecting the imprisonment for excess; the same extending beyond what was previously required of the person convicted; and a warrant of commitment founded on this conviction, and directing the gaoler to keep him in the terms of the adjudication, was also held void *in toto*, for which trespass and false imprisonment would lie against the justices, although the conviction had not been quashed. *Groome v. Forrester*, 5 M. & S. 314. So where a conviction on a statute does not pursue the provisions of it on the face of it; as where an information is to be laid at a special or petty sessions, and this does not appear on it. *Gimbert v. Coyney*, *M'Cle. & Y.* 469. A warrant of commitment for re-examination for an unreasonable length of time, is wholly void; *Davis v. Capper*, 10 B. & C. 28.; and this seems a question for the jury. *Cave v. Mountain*, 1 M. & G. 257. Where justices summarily convicted two persons of an assault under 9 Geo. 4. c. 31., and imposed a single joint fine on them instead of a separate one on each, the conviction was held void and the justices liable in trespass. *Morgan v. Brown*, 4 A. & E. 515. Where an act requires a "warrant to be issued," a commitment without a written one is bad, unless it be for temporary detainer while it is being drawn up. *Hutchinson v. Lowndes*, 4 B. & Ad. 118. But a warrant issued at the right time is not bad, because it bears too early a date. *Newman v. Hardwicke*, 3 N. & P. 368. A void conviction cannot be enforced, even though confirmed on appeal at sessions for want of due notice of the ground of appeal. *Semb. R. v. Boulbee*, 4 A. & E. 505.

A commitment for contempt must be in writing. *Mayhew v. Locke*, 2 Marsh, 377.

It has been doubted whether the plaintiff, in reply to the conviction relied on by the defendant, may shew by extrinsic evidence that the subject matter of the conviction was not within the jurisdiction of the defendant; though it seems quite clear, that if the magistrate has jurisdiction, it cannot be shewn that he has come to a wrong conclusion. In *Terry v. Huntington*, Hardr. 480., which was an action of trover brought to recover the value of goods levied under the warrant of the Commissioners of Excise, it was held, that, it appearing, upon special verdict, that they had adjudged low wines to be strong wines, and so had exceeded their jurisdiction, the warrant was void; and, *per Hale C.J.*, where the jurisdiction itself is stinted and examinable, there their acts are so too, and their judgment is no estoppel if the matter be not within their jurisdiction, which is a particular and circumscribed one. So in the above cited case of *Hill v. Bateman*, 1 Stra. 710., extrinsic evidence was admitted, to shew that the plaintiff had effects which might have been distrained. So it is said by Lord Ellenborough, with regard to an order of justices for diverting a highway, that justices cannot make facts by their determination in order to give to themselves jurisdiction contrary to the truth of the case; *Welch v. Nash*, 8 East, 402., *Brittain v. Kinnaird*, 1 B. & B. 439.; and see the observations of Le Blanc J., *Massey v. Johnson*, 12 East, 67. 82.; *Fuller v. Folch*, Carth. 346.; and *Strickland v. Ward*, 7 T. R. 634. (n.) But in *Gray v. Cookson*, 16 East, 23., it seems to have been the opinion of the court, that the plaintiff could not rely upon any matter which did not appear on the face of the conviction; and it appears to be now settled, that, if the jurisdiction appears on the face of the conviction it is now conclusive. *Basten v. Carew*, 3 B. & C. 649.; *Fawcett v. Fowles*, 7 B. & C. 394. Thus where a magistrate convicts under an act giving him jurisdiction in the case of boats, or for having partridges in possession, or keeping a dog without qualification, the plaintiff cannot shew that there was no boat, no partridge, or no dog. *Brittain v. Kinnaird*, 1 B. & B. 432. 442. And wherever, supposing the alleged facts true, the justice has jurisdiction, his liability or exemption is not affected by the falsehood of them, or by the insufficiency of the evidence adduced before him. Therefore an information, charging an offence within his jurisdiction, will protect him in an action of trespass, although the charge is unfounded and the information purports to be founded on inadmissible evidence. *Cave v. Mountain*, 1 M. & G. 257.; accord. *Q. v. Bolton*, 1 Q. B. 66.

In order to render the conviction a good defence, it must be connected with the warrant of commitment, and if it be a conviction for an offence differing from that recited in the commitment, it will furnish no justification; *Rogers v. Jones*, 3 B. & C. 409.; and it is doubtful whether the guilt of plaintiff is evidence in mitigation. *S. C.*, *R. & M.* 129. But in many statutes (as in the 7 & 8 G. 4. c. 30. s. 39.) there are clauses enacting that no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same. See *Daniell v. Philips*, 1 C. M. & R. 662. If the warrant of commitment does not shew an offence over which the justice had jurisdiction, a previous regular conviction will be no defence.

Wickes v. Clatterbuck, 2 Bing. 483. But where the warrant of commitment recited that the party had been charged on the oath of J. S., and it appeared in evidence that he was charged on the oath of J. O., it was held, that the recital of this false fact might be rejected, and that the warrant and conviction would then stand good. It was added by Le Blanc J. that the objection would have assumed a very different shape, if there had been no information on oath of any person whereon to found the conviction. *Massey v. Johnson*, 12 East, 67. 82. Where a justice, instead of drawing up a regular conviction, ordered the offender into custody till he could settle the matter with the prosecutor, which he accordingly did and was dismissed, it was held that the justice could not justify in an action of trespass. *Bridgett v. Coyney*, 1 M. & R. 211.

The acts of a justice, who has not duly qualified by taking the oaths, &c., are not absolutely void, so as to make him a trespasser. *Margate Pier Co. v. Hannam*, 3 B. & A. 266.

It is not material that the conviction should be drawn up formally at the time when it takes place. It will properly bear date at the time when in fact it took place, and the court will give credit to it as to a conviction made at that time, when produced in a collateral proceeding, such as an action of trespass. *Gray v. Cookson*, 16 East, 20.; *Massey v. Johnson*, 12 East, 82.; *Gimbert v. Coyney*, M.C. & Y. 478. Hence where a bad conviction has been drawn up, the justice may afterwards protect himself by a better one drawn up in time to produce it at the trial. But he cannot return an amended conviction after the bad one has been quashed on appeal or certiorari, or after the party, apprehended on a warrant reciting a bad one, has been discharged on habeas corpus by reason of such defect. *Chaney v. Payne*, 1 Q. B. 712. And *quære*, whether he can amend his conviction after he has filed one at the quarter sessions? *S. C. ib.*

An order of justices cannot be amended or altered after it is made; and there is a distinction between an order and a conviction in this respect. *R. v. Cheshire*, 5 B. & Ad. 439. Nor can a warrant of commitment be made out so as to justify a precedent commitment. *Hutchinson v. Lowndes*, 4 B. & Ad. 118.; and it is doubtful how far an order or warrant can be suspended or revoked. *Barons v. Luscombe*, 3 A. & E. 589. A warrant, issued to apprehend a party charged, must recite an information on oath, where such information is necessary; otherwise trespass lies. *Caudle v. Seymour*, 1 Q. B. 889. And such warrant, issued on an information taken by the justice's clerk in the absence of the justice is bad, and no defence. *S. C. ib.*

The warrant is not bad because it does not recite the circumstances necessary to found the conviction or order, which it is issued to enforce; at least, if it refers to the order in which those circumstances are stated. *Coster v. Wilson*, 3 M. & W. 411.

Where the warrant and conviction state all the circumstances which are essential to give them validity, and are connected by internal reference, no other evidence appears to be necessary than the production of them. *Strickland v. Ward*, 7 T. R. 631. (n.)

Tender of amends.] By 24 Geo. 2. c. 44. s. 2., a justice of the peace, at any time within one calendar month after notice, may tender amends to the party complaining, or his agent or attorney, and, in case

the same is not accepted, plead such tender in bar; and if upon issue joined thereon, the jury shall find the amends tendered to have been sufficient, they shall give a verdict for the defendant; and if the jury shall find that no amends were tendered, or that the same were not sufficient, and also against the defendant on other pleas, then they shall give a verdict for the plaintiff, and such damages as they shall think proper.

Where the defendant pleaded tender of 40s. amends, and the tender was admitted by the replication, and the notice of action was for seizing and carrying away goods to the value of 40s. only, it was held that the plaintiff could claim no more than 40s., which being covered by the tender, he was nonsuited. *Stringer v. Martyr*, 6 *Esp.* 134.

ACTIONS AGAINST SHERIFFS.

The evidence in actions against sheriffs will be considered under the following heads: 1. For taking the plaintiff's goods in execution. 2. For taking the goods of a tenant in execution without paying the arrears of rent. 3. For not paying over money levied. 4. For not arresting a debtor. 5. For an escape on mesne process. 6. For an escape in execution. 7. For taking insufficient pledges in replevin. 8. For a false return. 9. For extortion.

For taking the Plaintiff's goods in execution.

In trespass or trover against a sheriff for taking the plaintiff's goods, the plaintiff, as in actions against any other trespasser, may be put to prove the property of the goods, and the taking or conversion by the defendant.

Whether a sheriff, who seized and sold the goods of a trader after an act of bankruptcy of which he had no notice, was answerable to the assignees in an action of trover, was for some time an unsettled question; the Courts of King's Bench and Common Pleas held him liable; *Dillon v. Langley*, 2 *B. & Ad.* 131.; *Carlisle v. Garland*, 7 *Bing.* 298.; the Court of Exchequer formed a contrary opinion. *Balme v. Hutton*, 2 *C. & J.* 19. But the Exchequer Chamber reversed the judgment of the Court of Exchequer in the last case; 9 *Bing.* 471. (*Garland v. Carlisle*, 10 *Bing.* 452.; *Groves v. Cowham*, 10 *Bing.* 5.); and the judgment of the Exchequer Chamber was affirmed by the Lords. 4 *New Ca.* 7. Where the sheriff sold goods under a *fi. fa.* without notice of a previous act of bankruptcy by the defendant, and paid over the proceeds to the plaintiff upon an indemnity, it was held that the defendant's assignees might sue the sheriff for money had and received. *Young v. Marshall*, 8 *Bing.* 43. See now 2 & 3 *Vict. c.* 29., *antè*, p. 561. Money paid into court in lieu of bail by one who has committed an act of bankruptcy, and paid out to defendant by order of court, cannot be recovered by the assignees. *Reynolds v. Wedd*, 4 *New Ca.* 694.

If a sheriff, after notice of the allowance of a writ of error, executes a *fi. fa.*, he is liable in trespass. *Belshaw v. Marshall*, 4 B. & Ad. 336.

Evidence of property.] In general, it will be sufficient for the plaintiff to shew that he was in possession of the goods at the time of the seizure, which will be *prima facie* evidence of property, *anté*, p. 479. 504. If, not having been in possession himself, he relies upon an assignment from a former owner, he must prove the possession of such former owner, and the assignment to himself.

Evidence of the taking, &c.] The act of the bailiff in executing a writ is, in law, the act of the sheriff, though not justified by the writ; as where he takes A.'s goods under a warrant on a *fi. fa.* against B.; or even where the bailiff arrests after the return of the writ; *per Tindal C. J.*, *Price v. Peek*, 1 New Ca. 385.; *Underhill v. Wilson*, 6 Bing. 697.; or where the bailiff arrests under a *fi. fa.* *Smart v. Hutton*, 8 M. & W. 568. But the liability of the sheriff for the acts of his officers does not extend to cases where the former acts in a judicial character; as in his county court. *Tunno v. Morris*, 2 C. M. & R. 298. The production of a bill of sale executed by the defendant, and reciting the issuing of a writ and the seizure of the goods, will be evidence of a taking in trespass. *Woodward v. Larking*, 3 Esp. 286.

Evidence of the taking—connexion between the sheriff and the bailiff. In order to establish the connexion between the sheriff and his bailiff and to affect the former with the acts of the latter, the warrant should be proved; though it is not the only medium by which the privity of the sheriff to the act of his bailiff may be established. *Martin v. Bell*, 1 Stark. 417. Proof of the warrant, issued by the under-sheriff under the sheriff's seal of office, is sufficient without proof of the writ, which may be shewn by the defendant. *Gibbins v. Philipps*, 7 B. & C. 535. (n). If the warrant, remains in the hands of the bailiff (as it usually does after execution, for his justification), a *subpoena duces tecum* should be served upon the bailiff. If it has been returned to the sheriff's office, a notice to produce should be given, and secondary evidence will then be admissible; and where the warrant after the levy had been returned by the bailiff to the under-sheriff, the sheriff still being in office, it was held that a notice to produce served upon the attorney of the sheriff was sufficient. *Taplin v. Atty*, 3 Bing. 165. Where the warrant was not returned to the sheriff's office, but was given by the officer to a third person, and could not be found after diligent inquiry, secondary evidence of its contents was admitted without giving a notice to produce. *Minshall v. Lloyd*, 2 M. & W. 450. It will not be sufficient, in order to establish the connexion between the sheriff and bailiff, to shew that the latter is the bound bailiff of the former, and to produce and prove a paper received from the bailiff, purporting to be a copy of the warrant; *Drake v. Sykes*, 7 T. R. 113.; nor is it sufficient to produce an examined copy of the precept with the bailiff's name indorsed on it, though the sheriff has returned *cepi corpus*. *Martin v. Bell*, 1 Stark. 413. So where an examined copy of the writ and return with the bailiff's name written on the margin was produced, Lord Ellenborough held it insufficient to connect the sheriff with his acts; *Jones v. Wood*, 3 Camp. 228.; *Hill v. Sheriff of Middlesex*, Holt, N. P. C. 217., S. C. 7 Taunt. 8.; *Morgan v.*

Brydges, 2 Stark. 314.; but according to *Blatch v. Archer*, Coup. 63.; *M'Neil v. Perchard*, 1 Esp. 263.; *Fermor v. Philips*, 5 Moore, 184. (n), *S. C. 3 B. & B.* 27. (n); and *Bowden v. Waithman*, 5 Moore, 183., it should seem that the fact of the bailiff's name appearing upon the writ, without further proof, is evidence to go to the jury of the connexion between the sheriff and the bailiff. If the writing of the bailiff's name on the writ be proved to have been by the authority of the sheriff, it will then clearly be sufficient to establish this connexion. Thus where, in an action for an escape, the writ produced bore two indorsements, and the witness who produced the writ said that he belonged to the sheriff's office, that the writ came to the sheriff's office from the plaintiff's agent marked with the bailiff's name, and that he (the witness) again indorsed the bailiff's name on it, the court thought the sheriff's authority sufficiently proved. *Francis v. Neave*, 3 B. & B. 26. So where the plaintiff offered in evidence the writ with the name of the bailiff indorsed upon it, and it was also proved that the writ had been sent to the under-sheriff's office, where the name of the bailiff had been indorsed upon it, and that the custom of the office was to indorse upon the writ the name of the bailiff who was to execute it, *Richards C. B.* held this evidence sufficient. *Tealby v. Gascoigne*, 2 Stark. 202. So where an examined copy of the writ returned by the sheriff, with the officer's name indorsed, was produced and the writ was shewn to have been executed by a person of that name, and the course of the sheriff's office was to grant a warrant to the officer whose name was indorsed, or, if not, to strike the name out and insert that of another officer, the evidence was held to be *prima facie* sufficient to fix the sheriff. *Scott v. Marshall*, 2 C. & J. 238. A paper produced, on notice, from the sheriff's office, containing an order to the bailiff to give the necessary instructions for making a return to the writ and his answer, was held to amount to a clear recognition of the bailiff by the sheriff. *Jones v. Wood*, 3 Camp. 229. So where a bail bond, which had been executed and delivered to the bailiff, had been returned to the sheriff, who had made his return of *cepi corpus*, Lord Ellenborough held that this was sufficient to prove the agency of the bailiff. *Martin v. Bell*, 1 Stark. 416. Proof by the officer of seizure under a warrant brought to him by one who said it came from the sheriff's office, and that he knew the handwriting on it, but had since lost it, was held sufficient evidence. *Moon v. Raphael*, 2 Scott, 489.

Evidence of the taking—admissions by under-sheriff or bailiff.] The under-sheriff is the general deputy of the high sheriff for all purposes; per Lord Kenyon C. J., *Drake v. Sykes*, 7 T. R. 116.; and therefore his admissions are evidence against the sheriff without previous proof of his authority in the particular instance, provided they accompanied some official act done, or were made with reference to a matter in which the under-sheriff himself is the party to be charged. *Snowball v. Goodricke*, 4 B. & Ad. 541.; *anté*, p. 42. But as the bailiff is not the general officer of the sheriff, it is necessary to shew his agency in the particular instance before an admission by him can be made evidence against the sheriff; and it will then only be evidence in the same manner, and to the same extent, as an admission by any other agent. See *anté*, p. 42., and *Bousher v. Calley*, 1 Camp. 391. (n.) Declarations made by the officer, whilst in possession under a *fi. fa.* after the return of it, are

evidence against the sheriff. *Jacobs v. Humphrey*, 2 C. & M. 413. And where the defendant has used the affidavit of his officer on an interpleader motion, the affidavit may be used against him, even though the deponent is present in court, and not called. *Brickell v. Hulse*, 7 A. & E. 455. ; *antè*, p. 141.

Defence.

In an action for taking the plaintiff's goods in execution, one of the most usual defences is, that the goods had been fraudulently assigned to the plaintiff, and that they were in fact the goods of the party against whom the writ issued. This defence cannot now (by the rules of *H. 4 W. 4.*) be given in evidence under the general issue, but is admissible under a plea denying the plaintiff's property; and *Honell v. White*, 1 M. & Rob. 400., *contrà*, is not to be law; therefore, where, in trespass for taking goods, the defendant traversed the plaintiff's property, he was permitted to shew that the plaintiff took them under an assignment by B., fraudulent as against the defendant, who had seized them under a *bonâ fide* execution against B. *Ashby v. Minnitt*, 8 A. & E. 121. But the defendant cannot shew, under a plea of Not possessed, that the plaintiff become owner of the goods by assignment after the delivery of the writ to the sheriff. A special plea is necessary; for the assignment, if *bonâ fide*, passed the property, although the sheriff may still levy upon them unless sold in market overt. *Samuel v. Duke*, 3 M. & W. 622. ; *antè*, p. 507.

As to the matters that may be shewn by the plaintiff on a replication *de injuriâ*, &c. to a plea justifying under process, see *antè*, pp. 481, 492, 493.

[*Evidence of fraudulent assignment.*] In general, the continuing possession of the vendor or assignor is evidence of fraud. *Twyne's case*, 3 Rep. 80. (b.) Where a debtor executed a bill of sale of his goods to his creditor on the 27th of March, and possession was given by the delivery of a corkscrew, but all the effects continued in the possession of the debtor till the 7th of April, when he died, it was held that the bill of sale was fraudulent. *Edwards v. Harben*, 2 T. R. 587. So where an assignment to a creditor was made, and a servant of the assignee was immediately put into the house, but the assignor continued to carry on the business, as usual, for several weeks after, Lord Ellenborough held that the concurrent possession of the assignor was colourable, and that there must be an *exclusive* possession under the assignment, or it is fraudulent and void as against creditors. *Wordall v. Smith*, 1 Camp. 332.

But the want of transfer of possession does not in itself make the assignment void; it is only evidence of fraud. *Martindale v. Booth*, 3 B. & Ad. 498. ; *Carr v. Burdiss*, 1 C. M. & R. 782. ; *Eastwood v. Brown*, R. & M. 312. To make it absolutely void, there must be something that shews the deed fraudulent in the concoction of it. *Per* Lord Ellenborough, *Hoffman v. Pitt*, 5 Esp. 25. Where A. lends B. money to buy goods, and at the same time takes a bill of sale of them for securing the money, this transaction is valid. *B. N. P.* 258. ; *Steel v. Brown*, 1 Taunt. 381. So where the goods of A., being taken in execution and put up to sale, were bought by B., who took a bill of sale of the sheriff, but permitted A. to continue in possession, it was held that the transaction was valid. *Kidd v. Rawlinson*, 2 B. & P. 59.

So where the husband of the plaintiff's mother absconded, and his effects were publicly sold by auction, and the plaintiff purchased them in order to accommodate his mother and removed some, but left the greater part in her possession, it was held that there was a *bonâ fide* change of property. *Leonard v. Baker*, 1 M. & S. 251.; and see *Gezeph v. Ingram*, 1 B. Moore, 189. Where a creditor, having taken the goods of his debtor in execution, afterwards bought them at a public auction from the sheriff, and paid for them, taking a bill of sale, and let them to the former owner at a rent which was actually paid, the sale was held to be valid. *Watkins v. Birch*, 4 Taunt. 823. And where goods were seized and sold by the landlord under a distress for rent, and were purchased by a trustee of the tenant's estate for the benefit of the creditors, and were permitted by the trustee to remain in the possession of the tenant, it was held that they were not liable to be taken in execution by a creditor of the tenant. *Guthrie v. Wood*, 1 Stark. 367. The goods of A. were seized under a *fi. fa.*, and the judgment creditor took a bill of sale from the sheriff, and afterwards sold the goods to B., who put a man into possession, but the goods remained in A.'s house, and were used by him as before the execution; held (the circumstance of the execution being notorious in the neighbourhood) that the sale was good. *Latimer v. Balson*, 4 B. & C. 652. Again, where a debtor, previous to an execution, sold for the full value the whole of his lease, furniture, and household effects, to a creditor, and out of the purchase money paid several of the other creditors, but continued in the occupation of the house and furniture after the assignment, the sale was held to be valid. *Eastwood v. Brown*, R. & M. 312. So where a farmer gave a bill of sale of all his stock to secure a debt, and the agent of the creditor took possession and resided on the farm while he converted the stock, but the debtor also continued to reside on the farm, and exercised acts of ownership, and appeared as master, the agent of the creditor giving orders in his name, the jury found the transaction good, and the court refused to disturb the verdict. *Benton v. Thornhill*, 7 Taunt. 149.

An assignment of a part of a debtor's effects for the benefit of certain creditors, not made with the intention of fraudulently delaying his other creditors, is good. *Estwick v. Caillaud*, 5 T. R. 420. A. was indebted to B. and also to C., and, being sued to execution by B., voluntarily gave a warrant of attorney to C., on which judgment was entered and execution levied on the day on which B. would have been entitled to execution; held, that this preference was legal. *Holbird v. Anderson*, 5 T. R. 235.; *Meux v. Howell*, 4 East, 1. So where a debtor, being sued and insolvent, pending the suit and before execution assigned all his effects to trustees for the benefit of all his creditors, under which assignment possession was immediately taken, it was held that this assignment was not fraudulent, though made with intent to delay the plaintiff of his execution. *Pickstock v. Lyster*, 3 M. & S. 371.; see the observations of Richards B., *E. v. Watson*, 3 Price, 16. As to such an assignment being an act of bankruptcy, see *antè*, p. 537.

In order to prove the fraud, declarations made by the assignor at the time of executing the bill of sale are admissible, as part of the *res gesta*; but not if made at another time. *Phillips v. Eamer*, 1 Esp. 355.; *Penn v. Scholey*, 5 Esp. 243.; *Lewis v. Rogers*, 1 C. M. & R. 48. cited *antè*, p. 31. Where A. sued out a writ of *fi. fa.* against the goods of B., and the

sheriff executed a bill of sale of certain goods to A., after which, B. remaining in possession of the goods, the sheriff again took them under another execution against B., in an action of trover by A. against the sheriff for taking these goods, it was held that the declarations of B. at the time of the second execution were evidence for the defendant to shew that A.'s execution was colourable. *Willies v. Farley*, 3 C. & P. 395.

Damages.] The plaintiff, the purchaser of goods from A., took them at a valuation. The defendant afterwards seized them in execution against A., and sold them for a less sum: held, that the jury might give the greater sum as damages. *Lockley v. Pye*, 8 M. & W. 133.

For taking Goods in Execution without paying a Year's Rent.

By 8 Anne, c. 14. s. 1. no goods or chattels in or upon any messuage, lands, or tenements leased for life or lives, term of years, at will, or otherwise, shall be liable to be taken in execution unless the party, at whose suit the execution is sued out, shall, before the removal of such goods from off the premises, pay to the landlord of the premises, or his bailiff, all such sums of money as are due for rent for the premises at the time of the taking the goods, provided the said arrears of rent do not amount to more than one year's rent. And in case the arrears shall exceed one year's rent, then the party at whose suit the execution is sued out, paying the landlord, &c., one year's rent, may proceed to execute judgment; and the sheriff is empowered and required to levy and pay to the plaintiff as well the money paid for rent as the execution money.

By 11 Geo. 4. c. 11., the provisions of the statute of Anne are extended to a seizure and sale of goods under process issuing out of the Court of Pleas at Durham. *Brandling v. Barrington*, 6 B. & C. 467.

The plaintiff in this action may be called upon to prove, 1, the demise and the rent in arrear; 2, the seizure of the goods under the execution; 3, notice to the sheriff; 4, the removal of the goods without satisfying the rent; and 5, the value of the goods.

Evidence of the demise, &c.] As to proof of the tenancy, see *antè*, pp. 1, 197, 418, 455. The tenancy must be at a rent certain; therefore mere proof of occupation under an agreement for a future lease, without payment of rent, is not sufficient. *Riseley v. Ryle*, 11 M. & W. 16. The declaration need not state the particulars of the demise; but if stated, they must be proved as laid. *Bristow v. Wright*, 2 Doug. 665. In order to prove the rent in arrear it will be sufficient to shew the occupation by the tenant and the amount of the rent; and it is not necessary to call the tenant to prove the state of accounts between the landlord and himself. *Harrison v. Barry*, 7 Price, 690. A demise from a lessee to an under-tenant is within the statute. *Thurgood v. Richardson*, 7 Bing. 428.

The trustee of an outstanding satisfied term, held in trust to attend the inheritance, is a "landlord" within the statute. *Colyer v. Speer*, 2 B. & B. 67. The action may be brought by an executor or administrator.

Palgrave v. Windham, 1 *Str.* 212. On a sale of premises it was stipulated that, from the time of the vendee taking possession until the completion of the purchase, he should pay to the vendor at the rate of 100*l.* *per annum*; held that this was *rent*, and that the sheriff was bound to pay the amount thereof under the statute of Anne. *Saunders v. Musgrave*, 6 *B. & C.* 524.

The plaintiff can only recover the rent due at the time of the taking the goods, and not that which accrues after the taking and during the continuance of the sheriff in possession. *Hoskins v. Knight*, 1 *M. & S.* 245.

Evidence of the levy.] The plaintiff may prove the execution by production and proof of the writ and warrant, which will connect the bailiff and sheriff (see *antè*, p. 602.), and by proof of the levy having been made. The defendant pleaded Not guilty; want of notice of arrears; and nothing in arrear. The plaintiff's tenant proved the arrears and notice to one M. who took the goods in execution, and that there was only one execution: held, that the connection between M. and the defendant was admitted on these pleadings; and the plaintiff might recover, though he had taken a bill of sale of the goods from his tenant, which was fraudulent as against creditors, and in respect of which the jury negatived his property on a count in trover on the same record. *Reed v. Thoyts*, 6 *M. & W.* 410. See also *Barsham v. Bullock*, 10 *A. & E.* 23. A commission of bankrupt is not an execution within the act. *Lee v. Lopes*, 15 *East*, 230.

Evidence of notice.] In order to render the sheriff liable as a wrong doer by the removal of the goods, it must be proved that he had notice of the landlord's claim. *Armitt v. Garnett*, 3 *B. & A.* 441.; *Smith v. Russell*, 3 *Taunt.* 400. But no specific notice is required by the statute, and if a knowledge of the landlord's claim can be, by any means, brought home to the defendant or his bailiff before he has parted with the money raised by the levy, he will be liable. Thus, if it appears that the sale has been conducted with great secrecy and dispatch, it is for the jury to say whether the sheriff knew of the fact that the rent was in arrear, though no notice of it had been given to him before the sale. *Andrews v. Dixon*, 3 *B. & A.* 645. Notice to the creditor is not necessary. *Riseley v. Ryle*, 11 *M. & W.* 16.

Removal of the goods.] It is enough to shew that some goods were removed, and plaintiff need not shew that enough to satisfy the rent was not left. *Colyer v. Speer*, 2 *B. & B.* 67. It is doubtful whether the goods need be distrainable goods. *Riseley v. Ryle*, *suprà*.

Value of the goods.] The proof of value seems only necessary for the purpose of shewing the extent of the plaintiff's loss by the defendant's misconduct. But the jury are not confined to the precise amount produced on the sale by the sheriff; the plaintiff may insist that, if the defendant had proceeded regularly, the whole would have been paid, or may shew that the goods sold badly. *Per Taunton J.*; *Foster v. Hilton*, 1 *Dowl. P. C.* 35. 38. Nor are the jury bound even to give the sum for which they sold. *Per Parke J.*, *Calvert v. Jolliffe*, 2 *B. & Ad.* 418. 422.

Defence.

The precise effect of the plea of Not guilty in this action has not been settled by any reported decision. It operates as a denial of the "breach of duty, or wrongful act" of the defendant, but not of the acts stated in the inducement. The demise, rent in arrear, the seizure under the writ and the notice, seem to be matter of inducement in the form of declaration usually adopted. The removal without payment is the wrongful act; for the original taking is lawful; *semb.*, see Parke B. in *Risley v. Ryle*, 11 M. & W. 21.

A plea denying the taking admits that the goods taken belonged to the execution debtor. *Forster v. Cookson*, 1 Q. B. 419.

If the agent of the landlord takes from the sheriff's officer an undertaking to pay the year's rent, and consents to the sale, the landlord cannot afterwards maintain an action on the statute, though the rent be not paid pursuant to the undertaking, and though the undertaking be void by the statute of frauds. *Rothery v. Wood*, 3 Camp. 24. But this seems now to require a special plea.

It is no defence that the landlord has released his tenant in order to make him a competent witness. *Thurgood v. Richardson*, 7 Bing. 428.

Where the sheriff seizes after an act of bankruptcy committed by the tenant, he cannot retain a year's rent for the landlord against the assignees. *Lee v. Lopes*, 15 East, 230. But in an action by the landlord against the sheriff, who has levied under an execution after an act of bankruptcy committed, it is no defence that the tenant has become bankrupt, and that the sheriff is liable to the assignees. *Duck v. Braddyll*, M'Cl. 217.

For not paying over Money levied.

In an action for money had and received against a sheriff for not paying over to the plaintiff money levied under an execution in an action at the suit of the plaintiff, the latter must prove the writ of execution, and levy under it.

The writ of execution must be proved, or at least the warrant directed by the defendant to the officer who levied under it. *Wilson v. Norman*, 1 Esp. 154. If the writ has been returned and filed, an examined copy of it may be given in evidence; or if it be in the hands of the sheriff, a notice to produce must be served, and secondary evidence may then be given. See *antè*, p. 602., and *post*, p. 609.

It is doubtful whether this action can be maintained before the return-day of the writ; see the observations of Parke J. in *Morland v. Pellatt*, 8 B. & C. 727. The plaintiff must connect the sheriff with the bailiff by proving the warrant, or some act of recognition. See *suprà*, p. 602. If the defendant has returned the writ, and levied the sum, an examined copy of the writ and return will be sufficient. *Dale v. Birch*, 3 Camp. 347.; *Cator v. Stokes*, 1 M. & S. 599. It is not sufficient to prove the taking and selling of the goods by a person reputed to be an officer of the sheriff, without proof of the writ of execution or warrant. *Wilson v. Norman*, 1 Esp. 154. The defendant may deduct his poundage; *Longdill v. Jones*, 1 Stark. 346.; and the right to poundage under stat. Eliz. is not affected by the late statute 1 Vict. c. 55. *Davies v. Griffiths*, 4 M. & W. 377. See *post*, 620.

For not arresting a Debtor on Mesne Process, and false Return.

In an action against a sheriff for not arresting a debtor when he had an opportunity, the plaintiff must prove, (where those facts are put in issue by the pleadings,) 1, the debt due from the debtor to himself; 2, the issuing of the process and delivery to the defendant; and 3, that the debtor was within the bailiwick, and that defendant might have arrested him; 4, the false return of *non est inventus*, if alleged; and 5, the damage sustained.

Evidence of debt.] Whatever evidence would be sufficient to charge the debtor in an action brought against him by the plaintiff, will be sufficient against the sheriff in this action. *Sloman v. Herne*, 2 Esp. 695.; *Gibbon v. Coggon*, 2 Camp. 188. An admission by the debtor is therefore evidence. *Rogers v. Jones*, 7 B. & C. 86.; and see the next head, *Actions for Escape on mesne process*.

Evidence of issuing process.] The issuing of process and lodging it with the defendant for execution must be shewn. The plaintiff should produce the writ; or, if returned, should give in evidence an examined copy of the writ and return. If it be in the possession of the defendant, a notice to produce should be served. To prove that the writ remains in the possession of the defendant after the return-day, search should be made at the treasury, and, upon its appearing not to have been returned, it will be presumed, on proof of delivery to the under-sheriff, that it remains in the defendant's possession. See *antè*, p. 7, 75.

Evidence of the defendant's breach of duty.] If a person, against whom the sheriff has a writ, does not abscond, but continues in the daily exercise of his usual occupation, appears publicly, and is visible to every person that comes to him on business, and the bailiff, neglecting to arrest him, returns *non est inventus*, it is a false return. *Beckford v. Montague*, 2 Esp. 475. It has been ruled not sufficient merely to prove that the debtor was within the defendant's bailiwick, but that plaintiff must prove notice to the under-sheriff in the country, or to the bailiff to whom the warrant was directed. *Gibbon v. Coggon*, 2 Camp. 189. But it does not appear that the plaintiff is bound to give this notice to the sheriff; for the latter is bound to make due inquiries for the purpose of finding the debtor. *Dyke v. Duke*, 4 New Ca. 197.; acc. *Brown v. Jarvis*, 1 M. & W. 713. And he is bound to execute the writ as soon as he can, and he has not four months to do so. *Brown v. Jarvis*, *suprà*; *Randell v. Wheble*, 10 A. & E. 719.

Damages.] In order to recover, there must be some proof of actual loss or damage. *Brown v. Jarvis*, 1 M. & W. 704.; *Williams v. Mostyn*, 4 M. & W. 145.; see, however, *Barker v. Green*, 2 Bing. 317, *contrà*. Where the defendant, instead of pleading Not guilty, takes issue on a collateral matter, some damages, if alleged in the declaration, will be presumed. *Brown v. Jarvis*, *suprà*.

Defence.

The effect of the general issue in this action is not settled by any reported case. It at all events admits the debt and the issuing and delivery of the writ, and denies the "breach of duty" of the defendant, *i. e.* the neglect to arrest the party when he might have done so, and the falsehood of the return, if any. See *post*, pp. 617, 618.

A bound bailiff has been held an incompetent witness for the defendant to prove that he endeavoured to make the arrest. *Powell v. Hord*, 2 *Ld. Raym.* 1411. But this incompetency is now removed.

It is no defence that the debtor was arrested the day after the return of the writ; though it may govern the damages. *Barker v. Green*, 2 *Bing.* 317. But see *Brown v. Jarvis*, 1 *M. & W.* 704., *suprà*.

For Escape on Mesne Process.

In an action on the case against the sheriff for an escape on mesne process, the plaintiff may be called upon to prove: 1, the debt due from the party arrested; 2, the issuing and delivery of the process to the defendant; 3, the arrest; 4, the escape; and 5, the damage.

Evidence of the debt due from the party arrested.] The plaintiff must prove a debt due to him from the party arrested, at the time of the arrest. *Alexander v. Macauley*, 4 *T. R.* 611.; *White v. Jones*, 5 *Esp.* 160. If the declaration states that the party was indebted to the plaintiff for goods sold and delivered, it must be so proved; *Parker v. Fenn*, 2 *Esp.* 477. (n); but the exact sum mentioned in the declaration need not be proved. *B. N. P.* 66. The debt is proved by the same evidence which would have been requisite to establish it in an action against the debtor himself; therefore an admission of the debt by the debtor at any time before the escape is good evidence against the sheriff. *Williams v. Bridges*, 2 *Stark.* 42.; *Rogers v. Jones*, 7 *B. & C.* 69. See *antè*, p. 609.

Evidence of the issuing and delivery of the process to the defendant.] The issuing of the process and the delivery of it to the under-sheriff must be proved. If the process has been returned, an examined copy of the writ and return will be evidence of these facts. *B. N. P.* 66. If not returned, after proof of a notice to produce and that search has been made at the treasury, secondary evidence will be admitted. A delivery to a country sheriff's deputy in London is a delivery to the sheriff. *Woodland v. Fuller*, 11 *A. & E.* 859.

Where it was averred that the debtor was arrested "under a writ indorsed for bail by virtue of an affidavit now on record," it was held necessary to prove the affidavit. *Webb v. Herne*, 1 *B. & P.* 281. Where the declaration stated that the writ was marked for bail "by virtue of an affidavit of the cause of action by the plaintiff in that behalf before then made, and duly filed of record in this court, &c." without stating by whom the affidavit was made, it was held that the averment was sufficiently proved by an office copy of the affidavit. *Casburn v. Reed*, 2 *B. Moore*, 60. A variance between the process stated and that proved was formerly fatal; but where it was alleged that the prisoner

was arrested on mesne process and brought before a judge at chambers by virtue of a writ of *habeas corpus*, and was by him thereupon committed to the custody of the marshal, "as by the record thereof now remaining in the Court of King's Bench appears, &c.," it was held that such allegation was either impertinent and surplusage, since, properly speaking, such documents are not records; or, considering them as *quasi* of record, the allegation was sufficiently proved by the production of them from the office of the clerk of the papers. *Wigley v. Jones*, 5 *East*, 440.; and see *Bevan v. Jones*, 4 *B. & C.* 403.; *Bromfield v. Jones*, 4 *B. & C.* 380.; and *antè*, pp. 64, 65.

Evidence of the arrest.] The facts sufficient to constitute an arrest have already been noticed under the title *Malicious Arrest*, *antè*, p. 388.; also *antè*, p. 571.; and *post*, p. 612. Where a party is arrested in one action he is in custody under all writs delivered to the sheriff, unless the first arrest was illegal. *Collins v. Yewens*, 10 *A. & E.* 570. The plaintiff gave in evidence the sheriff's return of *cepi corpus* to the writ, and proved that the defendant in the former action did not put in bail above, and was not in the sheriff's custody at the return of the writ; Lord Ellenborough held that the arrest and escape, and the non-appearance of the party according to the exigency of the writ, were sufficiently proved. *Fairlie v. Birch*, 3 *Camp.* 397. The sheriff is bound by his return both as to the fact and the time of the arrest. *Cook v. Round*, 1 *M. & Rob.* 512. Where the writ has not been returned, evidence must be given to connect the bailiff and the sheriff; see *antè*, p. 602.

Evidence of the escape.] That the debtor was seen abroad after the return of the writ, and that bail has not been put in, will be evidence of an escape. *Fairlie v. Birch*, *suprà*. And the return of *cepi*, coupled with an answer given at the sheriff's office that "no bail bond was executed," is evidence of the same; though the return includes the words *paratum habeo*. *Neck v. Humphery*, 3 *A. & E.* 130. The sheriff is bound to keep the party in *arctâ custodiâ* after the return day; and therefore it is an escape for the gaoler to take him out of prison for a period however short, though never out of his own custody. *Williams v. Mostyn*, 4 *M. & W.* 145. If the declaration alleges a taking in execution of A. and his wife, and that both escaped, it is enough to prove that A. alone was taken in execution for a debt of his wife before coverture. *B. N. P.* 65.

As to the amending of a variance where the jury find an omission to arrest, instead of an escape, see *Guest v. Elwes*, 5 *A. & E.* 118., cited *antè*, p. 70.

An admission of the escape by the under-sheriff is evidence against the sheriff. *B. N. P.* 66. The party escaping may be called to prove a voluntary escape; *B. N. P.* 67.; for though the whole debt may be recovered against the sheriff, yet in an action against the original debtor for the debt, he can neither plead in bar, nor give in evidence in reduction of damages, the judgment obtained in the action against the sheriff. *Per Abbott C. J., Hunter v. King*, 4 *B. & A.* 210.

Damages.] The plaintiff is only entitled to recover such damages as he can shew he has sustained. If he has lost the whole debt, the jury

must give him damages to that extent, together with what he has lost in costs; if he can still recover his debt, the damages may be diminished accordingly. *Scott v. Henley*, 1 M. & Rob. 227.; *Morris v. Robinson*, 3 B. & C. 206. And no action lies unless some damage has been actually sustained. *Williams v. Mostyn*, 4 M. & W. 145.

Defence.

By the rules of H. 4 W. 4. in actions on the case for an escape, the plea of Not guilty shall only operate "as a denial of the neglect or default of the sheriff or his officers; but not of the debt, judgment, or preliminary proceedings." Hence it should seem that the default of the defendant in suffering the escape, and the damage, are alone put in issue by Not guilty. Before the new rules, a plea of No escape was held to admit the arrest. *B. N. P. 67.*

It is a good defence that the defendant, though he has taken no bail-bond, has put in bail before the expiration of the rule to bring in the body. *Pariente v. Plumbtree*, 2 B. & P. 35.

Where the defendant pleads that before the escape he took a bail-bond with a condition according to the statute, &c., which he assigned to the plaintiff, and the replication denies that there was any such condition, the issue is not supported by defendant's producing a bond in the condition of which the prisoner's name is left in blank in two places. *Holden v. Raphael*, 4 A. & E. 228.

It is a good defence that the bailiff, who permitted the escape, was a bailiff appointed at the special request of the plaintiff; *Ford v. Locke*, 6 A. & E. 699.; and this appears to have been there given in evidence under Not guilty. But it is no answer that the plaintiff merely suggested to the sheriff the employment of a particular officer. *S. C. ib. per Cur.*; and *Balson v. Meggat*, 4 Dowl. P. C. 557.; and see *Doe v. Trye*, 5 New Ca. 573. cited, *post*, p. 615.

For Escape in Execution.

In an action against the sheriff for suffering a prisoner in execution to escape (which has usually been in debt) the plaintiff must, if those facts be denied on the pleadings, prove, 1, the judgment; 2, the issuing, and delivery to the defendant of the writ of *ca. sa.*; 3, the arrest; and 4, the escape.

For the mode of proving the judgment, see *antè*, p. 74, 75.; as to variances, see p. 65.; as to proof of issuing and delivery of the writ, *antè*, p. 610.; and as to connecting the defendant with the act of his officer, *antè*, p. 602.

By 5 & 6 Vict. c. 98. s. 31., if a debtor in execution escapes out of legal custody after that act (10th of August 1842), the sheriff, bailiff, or other person having the custody, shall be liable only to an action on the case for damages sustained by the person at whose suit the debtor was taken or imprisoned, and shall not be liable to any action of debt.

Evidence of arrest.] What constitutes an arrest; see *antè*, p. 388. 571. and 611. In order to render the sheriff liable, the officer must be the authority to arrest, but he need not be the hand that arrests, nor in the presence of the person arrested, nor actually in sight; nor is

any exact distance prescribed. It would be a different case if he were upon some other errand, or stay at home and send a third person to make the arrest; *Per* Ld. Mansfield C. J., *Blatch v. Archer, Coup.* 65., in which case the son of the officer said, at the time of the arrest, that he had his authority in his pocket, the officer himself being at the distance of thirty rods and not in sight; and it was held a good arrest. If A. be in custody at the suit of B., and a writ be delivered to the sheriff at the suit of D., the delivery of the writ is an arrest in law, and, if A. escape, D. may bring debt against the sheriff for an escape. *B. N. P.* 66.

It must appear that the prisoner was in the custody of the *defendant*; and, therefore, where he was taken in execution by a former sheriff, the assignment of the prisoner from him to the defendant by indenture ought to be proved; *Davidson v. Seymour, M. & M.* 34.; unless the defendant has become sheriff on the death of his predecessor, in which case he is bound, at his peril, to take notice of all the executions which are against any persons whom he finds in gaol. *Westby's case, 3 Rep.* 72. b.; *B. N. P.* 68.; see the note in *M. & M.* 35.

In an action against the marshal for an escape, the declaration alleged a submission by the plaintiff and A. B. to arbitration, the award, the attachment, and the escape; it was held that the submission must be proved, though it would perhaps have been otherwise if the plaintiff had only alleged the making of the rule of court for the issuing of the attachment. *Braxier v. Jones, 8 B. & C.* 124. Debt against the bailiff of a liberty for an escape alleging a mandate by the sheriff to the defendant, "as chief bailiff of the liberty," to arrest T.; held, on a traverse of the allegation, that it was not supported by proof of a sheriff's warrant in the common form addressed to the defendant as *his* bailiff; and this, although the defendant had treated it as a mandate, and not as a warrant, on a rule to return it. *Jackson v. Hill, 10 A. & E.* 477.

Where the commitment is by an act of a court of record, the record of it must be proved in the usual way by an examined copy. *Turner v. Eyles, 3 B. & P.* 456.

Evidence of the escape.] Wherever the prisoner in execution is in a different custody from that which is likely to enforce payment of the debt, it is an escape. *Per* Buller J., *Benton v. Sutton, 1 B. & P.* 27. Thus if a sheriff's officer, having taken a prisoner in execution, permits him to go in company with one of his followers to his own house for the purpose of settling his affairs, it is an escape. *Ibid.* If the defendant, when taken in execution, is seen at large for ever so short a time either before or after the return of the writ, it is an escape. *Per* De Grey C. J., *Hawkins v. Plomer, 2 W. Bl.* 1049. If the bailiff of a liberty, who has the return and execution of writs, removes a prisoner, taken in execution, to the county gaol, situate out of the liberty, and there delivers him into the custody of the sheriff, it is an escape for which the bailiff is liable. *Boothman v. Earl of Surry, 2 T. R.* 5. Where the officer, having taken a party in execution, permitted him to go to a lock-up house kept by another officer not named in the warrant, where he remained fourteen days *before the return of the writ*, it was held no escape. *Houlditch v. Birch, 4 Taunt.* 608. If the sheriff receives the sum indorsed on the writ from the prisoner, and, before payment over to the plaintiff, liberates him, it is an escape. *Slackford v. Austen, 14 East, 468.*; *Crozer v. Pilling, 4 B. & C.* 31. The plaintiff

is not estopped by a return of *cepi corpus* by the defendant. *Jackson v. Hill*, 10 A. & E. 477.

A voluntary escape is by the express consent of the keeper; a negligent one is without consent or knowledge. Release by mistake is a voluntary escape. *Filewood v. Clement*, 6 Dowl. P. C. 508. Under a count for a voluntary escape, the plaintiff may give evidence of a negligent one. *Bonafous v. Walker*, 2 T. R. 126.

By stat. 8 & 9 W. 3. c. 27., s. 8., if the keeper of any prison shall, after one day's notice in writing given for that purpose, refuse to shew any prisoner, committed in execution, to the creditor at whose suit he was committed or charged, or to his attorney, every such refusal shall be adjudged an escape in law. And by s. 9., if any person desiring to charge any person with any action or execution, shall desire to be informed by any such keeper whether such person be a prisoner in his custody or not, the keeper shall give a true note in writing thereof to the person so requesting, or to his attorney, upon demand at his office for that purpose; and every such note shall be taken as sufficient evidence that such person was at that time a prisoner in actual custody.

Damages.] Where the action is in the form of debt, the amount for which the debtor was in execution is the measure of the damage; but where the plaintiff sues in Case (which he must do, since 5 & 6 Vict. c. 98. *supra*, p. 612.) the jury may exercise their judgment in assessing the damages, and may give such amount as they think sufficient to cover the loss suffered, or eventually likely to be suffered, by the plaintiff; *Bonafous v. Walker*, 2 T. R. 126. In the former case, the plaintiff cannot afterwards recover against the prisoner; in the latter he can. *S. C. Ib.* See 1 Saund. 38 (n).

Defence.

The usual plea in debt, before the late rules, was *nil debet*; but now the defendant "must deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance." *H. T.* 4 W. 4.

Since stat. 5 & 6 Vict. c. 98. (*supra*, p. 61) Not guilty will be a proper plea, where the breach of defendant's duty is denied; as to which see *ante*, p. 612.

By statute 8 & 9 W. 3. c. 27. s. 6., no retaking on fresh pursuit shall be given in evidence on the trial of any issue in an action of escape, unless the same be specially pleaded; nor shall any special plea be allowed without an oath by the defendant that the prisoner escaped without his consent, privity, or knowledge. Before this act, fresh pursuit was evidence under *nil debet*. *Mosedell's case*, 1 Mod. 116.; *Gill. Ev.* 283, 4th ed.

Where the defendant pleaded that the prisoner returned into his custody, and that he did thereupon, then, and afterwards, keep and detain the said prisoner in his custody, &c., and the plaintiff traversed that after the prisoner's return the defendant did keep and detain him in custody, &c., in manner and form, &c., it was held that the plea was negatived by evidence that after the prisoner's return he again escaped, and died out of custody. *Chambers v. Jones*, 11 East, 406. If the defendant pleads No escape, he cannot give in evidence no arrest, for

he admits an arrest by his plea. *B. N. P.* 67. It is no defence that the prisoner paid his debt to the defendant, unless, before action brought, he has paid it over to the plaintiff. *Slackford v. Austen*, 14 *East*, 468.

If the prison take fire, or be broken open by the king's enemies, by means whereof the prisoners escape, this will excuse the sheriff; but it is otherwise if the prison be broken open by the king's subjects. *B. N. P.* 66. So he may shew that the escape was by the fraud and covin of the party really interested in the judgment. *Hiscocks v. Jones*, *M. & M.* 269.

The defendant may shew that the judgment against the prisoner was void, but not that it was erroneous; thus he may shew that the judgment was given in an inferior court in debt on a bond made *extra jurisdictionem*; for such a judgment is void. *B. N. P.* 65, 66.; *Watson on Sheriffs*, 54. So if the writ of execution be absolutely void, the sheriff will not be liable for an escape; but it is otherwise when it is only erroneous. *Weaver v. Clifford*, *Cro. Jac.* 3.; *Burton v. Eyre*, *id.* 288.; *B. N. P.* 66.

The defendant may shew that he discharged the prisoner by virtue of an order of the insolvent debtors' court, and the order itself is sufficient evidence, 7 *Geo.* 4. c. 57. s. 81.; and, by the same section, he may give the special matter in evidence under the general issue. *Saffery v. Jones*, 2 *B. & Ad.* 598. Where the arrest was illegal and was made by a sheriff's officer named and chosen by the plaintiff's attorney who was present and active at the arrest, it was held that the sheriff was not liable for an escape. *Doe v. Trye*, 5 *New Ca.* 573.

For taking insufficient Pledges in Replevin.

In an action on the case against a sheriff for taking insufficient pledges in replevin, the plaintiff must prove (if those facts are denied on the pleadings), 1, the amount of rent due, and the distress; 2, the replevy of the distress by the sheriff, and the proceedings of the replevin suit; 3, the taking of the bond; 4, the insufficiency in the sureties.

Evidence of the replevy.] The replevy of the distress may be proved by the original precept to deliver under the defendant's seal of office, which must be shewn to be genuine. If it be in the hands of the bailiff, he should be served with a *subpœna duces tecum*; if it be returned to the sheriff, a notice to produce should be given to let in secondary evidence. The connection between the sheriff and the bailiff may also be proved by shewing that the sheriff has recognised the bailiff's acts. See *suprà*, p. 602.

Evidence of the proceedings in replevin.] The proceedings in the suit must be proved as alleged; the proceedings in the county court, not being of record, may be proved by the minutes or entries in the sheriff's book, or by examined copies. See *antè*, p. 80. A variance in the names of the suitors is not material. *Draper v. Garratt*, 2 *B. & C.* 2. If removed by *refalo*, the proceedings in the court above must be proved like other records; *antè*, p. 73—75.

Evidence of the bond.] Notice to produce the bond should be given to the defendant. Where it was produced under such notice, and it

appeared that, upon inquiry made on behalf of the plaintiff whether any replevin bond had been executed, the original bond had been shewn to the plaintiff's agent, and a copy of it delivered to him, it was held unnecessary to call the subscribing witness, and that, as against the sheriff, it must be taken to be a valid bond. *Scott v. Waithman*, 3 Stark. 168. So where it was proved that the sheriff had assigned the bond to the plaintiff, Abbott C. J. held it was not necessary to prove the execution by the sureties; for that, as against the sheriff, proof of the assignment by him to the plaintiff was sufficient. *Barnes v. Lucas*, R. & M. 264. Where the replevin bond was produced in court and referred to by both sides, though not actually put in evidence, the court, on motion for a new trial, held this equivalent to an admission of the bond. *Jeffery v. Bastard*, 4 A. & E. 823.

Evidence of the insufficiency of the sureties.] Some evidence must be given by the plaintiff of the insufficiency of the sureties; but very slight evidence is enough to throw the proof on the sheriff; for the sureties are known to him, and he is to take care they are sufficient. *Sewdors v. Darling*, B. N. P. 60. He is bound to exercise a reasonable discretion and caution, and this is a question for the jury; *Jeffery v. Bastard*, 4 A. & E. 823.; and he ought not to be satisfied with their own statements upon examination. *S. C. ibid.* Where the sureties had recently been bankrupt, but were in apparent credit when the bond was taken, it was held that the sheriff was not liable. *Hindle v. Blades*, 5 Taunt. 225. If a person, known to the sheriff, makes inquiries as to the credit or reputation of a tradesman and the value of his stock, and communicates a favourable result of such inquiry to the sheriff, the latter need not make a personal inquiry. *Per Dallas C. J., Sutton v. Waite*, 8 B. Moore, 28. Though the sheriff is justified in taking a person as a surety who appears to the world to be a person of responsibility, yet if he actually knows that the party is not responsible, or having the means of informing himself upon the subject, he neglects to use them; then, notwithstanding appearances, he is responsible in the event of the surety being really insufficient. *Scott v. Waithman*, 3 Stark. 170. Reputation among neighbours is evidence of their credit. *S. C. Ib.* In order to prove the insufficiency, evidence may be given that applications had been made to the surety for money by different creditors at different times, which he was unable to pay, and that he had repeatedly broken his promises to pay. *Gwyllim v. Scholey*, 6 Esp. 100.

The sureties in the bond may be witnesses to prove whether they are sufficient or not. 1 *Saund.* 195. g (n).; *Hindle v. Blades*, 5 Taunt. 225.

If one of the two sureties is insufficient, the plaintiff must recover. *Scott v. Waithman*, *supra*. But in replevin for a distress damage feasant, the sheriff is not bound to take more than one surety. *Hucker v. Gordon*, 1 C. & M. 58.; *S. C.* 3 Tyrwh. 107.

Damages.] The sheriff is only liable to the extent to which the sureties themselves are liable, viz. the penalty, or double the value of the goods distrained. *Evans v. Brander*, 2 H. Bl. 547.; *Baker v. Garratt*, 3 Bing. 59.; *Paul v. Goodluck*, 2 New Ca. 220. And this is the limit, though a greater loss is confessed on the pleadings. *Jeffery v. Bastard*, 4 A. & E. 823.

For not Levying, and for False Return.

In an action on the case against a sheriff for a false return to final process, the plaintiff must prove, if those facts are denied on the pleadings, 1, the judgment; 2, the writ and indorsement, and the return; 3, the falsehood of the return. The action for not arresting and falsely returning *non est inventus*, has been already treated of, *supra*, p. 609.

As to the mode of proving the judgment, see *antè*, p. 73—75.; and as to the writ and return, *antè*, p. 75, 609.

The judgment is mere inducement; *Stoddart v. Palmer*, 3 B. & C. 2. The untrue return is the ground of action, though the injury to the plaintiff depends on the right to recover on the judgment.

It is not necessary to prove an actual levy after seizure under a *fi. fa.* *Stubbs v. Lainson*, 1 M. & W. 728. Where issue was taken on the record of a judgment, "in the court of our late Lord the King, *prout patet per recordum* in the court of the said King," and the action for the false return was commenced since the accession of the Queen, held, on production of a record of 7 W. 4. that it was no variance. *Lewis v. Alcock*, 6 Doubl. P. C. 78.

Evidence to disprove the return.] The plaintiff must prove the falsehood of the return. Thus in an action for a false return of *nulla bona* to a *fi. fa.* he must shew that the party had goods within the bailiwick of which the sheriff had notice, or might, by using due diligence, have had notice; *antè*, p. 609. In an action for a false return of *nulla bona* to a *fi. fa.* against the goods of A. and B., the plaintiff must have a verdict if he prove that either had goods. *Jones v. Clayton*, 4 M. & S. 349.

The declarations of the sheriff's officer respecting goods seized by him under a *fi. fa.* and in his possession at the time, are evidence against the sheriff, though made after the return day of the writ. *Jacobs v. Humphrey*, 2 C. & M. 413.; *S. C.* 4 Tyrwh. 272.; *antè*, p. 603.

Defence.

The plea of Not guilty to an action for not handing over monies levied on a *fi. fa.* and falsely returning *nulla bona*, has been held to put in issue the facts of the defendant having the money in his hands and making the return alleged; and therefore defendant cannot set up, under that plea, the bankruptcy of the debtor before execution. *Wright v. Lainson*, 2 M. & W. 739. "Inducement (in the new rules) includes every thing which does not involve the special charge alleged against the sheriff. The breach is, first, his not having the money ready; secondly, his making such return." *Per cur. Ib.* 748. Such a defence would have been evidence under a plea denying the seizure of the debtor's goods; *S. C.* 3 M. & W. 44.; *Rowe v. Ames*, 6 M. & W. 747. So where the declaration charged, that although there were goods of the debtor, defendant did not levy in a reasonable time but returned *nulla bona*, on the plea of Not guilty it was held that the fact of there being goods was not put in issue, and that defendant therefore could not shew an assignment by the debtor before execution issued. *Lewis*

v. Aker, 3 M. & W. 156.; and per Parke B., 3. "The breach is, that defendant did not use due diligence to levy, and returned *nulla bona*; if he proved that he did not return *nulla bona*, the latter proposition would be disproved; if he did use due diligence, the former would be disproved." And according to the report of S.C. in 6 Dougl. P. C. 389., the plea admits the judgment, the writ, the delivery of it to defendant as sheriff, that there were goods in his bailiwick, and that he had notice of them; and only the wrongful act is put in issue. The word "falsely" denotes a conclusion of law, if the facts stated are true; but is not a separate, traversable allegation. Where the declaration is for neglecting to sell and falsely returning that the goods remained unsold for want of buyers, the plea of Not guilty puts in issue the neglect of duty. *Rowe v. Ames*, 6 M. & W. 747. If the goods seized under a *fi. fa.* are exhausted by payment of landlord's rent, expenses, and the sum due on a prior writ, the return of *nulla bona* is proper; *Windle v. Freeman*, 11 A. & E. 539., in which case the plea was a special one, stating that the debtor had no goods whereof, &c., and the replication denied the plea. And *semb.* the defence might have been shewed under a traverse of the levy stated in the declaration; for where such levy was alleged and a special plea, stating the exhaustion of the goods by a prior writ, was pleaded, the court held it to be an argumentative traverse of the levy; and, per Cur. "Such traverse would put in issue three questions; 1, whether the goods were sold at all; 2, whether they were sold under the plaintiff's writ; 3, whether the proceeds were applicable to the plaintiff's writ. The plaintiff would have proved the issue *prima facie* by proving a sale; because, as the traverse admits a seizure under the plaintiff's writ, any sale would be presumed to be also under it, and the proceeds to be applicable to it." *Drewe v. Lainson*, 11 A. & E. 529. And the insufficiency of the goods to satisfy prior claims will entitle the defendant to a verdict. *Heenan v. Evans*, 3 M. & G. 390. But the plaintiff may shew, upon this issue, that the judgment, in respect of which a prior writ issued, is fraudulent, and that the sheriff had notice of it; and the debtor's conduct as to the execution of the prior writ is evidence of fraud. *Imray v. Magnay*, 11 M. & W. 267.

Where in action for a false return of *nulla bona* to a writ of *fi. fa.*, the defence is that the party against whom the writ issued has become bankrupt, and that a commission has issued against him, the bankruptcy must be regularly proved. *B. N. P.* 41.; and see *Dowden v. Fowle*, 4 Camp. 38. As to the proof of bankruptcy, see *antè*, p. 526—550.

Where the defendant shews that he paid the money levied to the landlord, under 8 Anne, c. 14., for arrears of rent, some evidence, though slight, must be given of the rent being due. *Keighley v. Birch*, 3 Camp. 521. Where the sheriff returned *nulla bona* after satisfying the landlord's claim for rent and the king's taxes, and the plaintiff assented to his quitting possession of the premises and sued out a *ca. sa.*, it was held that he could not afterwards maintain an action for a false return to the *fi. fa.*, however unfounded the claim for rent might turn out to be. *Stuart v. Whittaker*, R. & M. 310.

The defendant may shew that the judgment, on which the writ issued, was fraudulent and void. *Penn v. Scholey*, 5 Esp. 243. But it must be a clear case of fraud and collusion to avoid a judgment, so as to let in this defence. *Tyler v. Duke of Leeds*, 2 Stark. 221.; *Harrod v. Benton*, 8 B. & C. 219.

Where the defence is, that the goods in question were assigned before the execution, the plaintiff, in reply, may shew the assignment to have been fraudulent. *Dewey v. Bayntun*, 6 *East*, 257.

The defendant cannot give in evidence, even in mitigation of damages, an inquisition held by him to inquire into the property of the goods, under which they were found not to be the property of the debtor. *Glossop v. Pole*, 3 *M. & S.* 175.

Damages.] Where the sheriff is sued for returning *nulla bona*, instead of levying on certain property which belonged jointly to the debtor and to another, the proper measure of damage is half the value of the goods. *Tyler v. Duke of Leeds*, 2 *Stark.* 218.

Competency.] The following decisions occurred before disqualifications by reason of interest were removed by statute. A person who has forcibly taken the goods out of the hands of the sheriff is competent to prove his own property in them; for the sheriff cannot maintain an action against him for the rescue after a return of *nulla bona*. *Thomas v. Pearce*, 5 *Price*, 547. And the assistant to a sheriff's officer, who has been left in possession under an execution, is a competent witness for the sheriff; for, as he was not employed by the defendant himself, the judgment would not be evidence either for or against the witness. *Clark v. Lucas*, *R. & M.* 32.

For Extortion.

The evidence in this action depends entirely on the allegations in the declaration, and the pleadings.

In debt on 28 *Eliz. c. 4.* for extortion in executing a *fi. fa.*, if the plaintiff states the judgment in his declaration, and that execution was sued out on the *said* judgment, it must be proved. *Savage v. Smith*, 2 *W. Bl.* 1101.; *Peppin v. Solomons*, 5 *T. R.* 498.

The mode in which the issuing of the *fi. fa.* (*antè*, p. 609.) and the connexion between the sheriff and the bailiff (*antè*, p. 602.) may be proved, has been already stated. If the sheriff has returned to the writ that he has caused to be levied, &c., it will be evidence that he has adopted the act of the bailiff as his own. *Woodgate v. Knatchbull*, 2 *T. R.* 154. It must appear that the sheriff intrusted the bailiff with his authority in the particular case in which the latter has abused it, and therefore, if the extortion be committed by an officer not named in the warrant, to whose house the party had been carried, the sheriff is not liable. *George v. Perring*, 4 *Esp.* 63. So where a writ is directed to the coroner, though it is executed by an officer of the sheriff, the latter is not liable. *Sargeant v. Cowan*, 1 *C. & M.* 491.; *S. C.* 3 *Tyrwh.* 538.

Where the money levied is not sufficient to satisfy the plaintiff's claim, the retaining of any part which ought to be paid over to the plaintiff, is an indirect receiving or taking from him within the statute 28 *Eliz. c. 4.* *Buckle v. Bewes*, 3 *B. & C.* 688.

In actions against a sheriff's officer on 32 *Geo. 2. c. 28.*, it was formerly held that the plaintiff must prove a table of fees allowed by the justices. *Jaques v. Whitcomb*, 1 *Esp.* 361.; *Martin v. Slade*, 2 *New*

Rep. 59. In *Martin v. Bell*, 6 *M. & S.* 220., it was held by the court of King's Bench, that this table did not apply to the sheriff's fees for an arrest, but that what is allowed by the master on taxation is what he is by law to take. But in *Innes v. Levy*, 4 *Dowd. P. C.* 116, *S. C.* 2 *Scott*, 189., *Philpott v. Selby*, *Seacc. T. T.* 1835, and *Plevin v. Prince*, 10 *A. & E.* 494., it was held that the stat. 23 Hen. 6. c. 9. was then in force, which prohibits the sheriff from taking more than 1s. 8d., and the bailiff more than 4d. This statute is now repealed by 7 W. 4. & 1 Vict. c. 55. which permits sheriffs and their officers to take such fees, and no more, as are allowed by the officers of the courts of law at Westminster under the sanction of the judges. And by 5 & 6 Vict. c. 98. s. 31., after 1st March 1843 no poundage shall be taken by sheriffs, bailiffs, and others for taking the body in execution; and only such fees shall be taken by the sheriff, or persons having return of writs, as shall be allowed under 7 W. 4. & 1 Vict. c. 55.

APPENDIX, No. I.

As the late rules on pleading, and on the proof of documents, are frequently referred to at *Nisi Prius*, it has been thought advisable to insert, at the close of this work, the following extracts from them.

REGULÆ GENERALES.

Hilary Term, 4 W. 4.

Rule 20. Either party, after plea pleaded, and a reasonable time before trial, may give notice to the other, either in town or country, in the form hereto annexed, marked A., or to the like effect, of his intention to adduce in evidence certain written or printed documents; and unless the adverse party shall consent, by indorsement on such notice, within forty-eight hours, to make the admission specified, the party requiring such admission may call on the party required, by summons, to shew cause before a judge why he should not consent to such admission; or, in case of refusal, be subject to pay the costs of proof. And unless the party required shall expressly consent to make such admission, the judge shall, if he think the application reasonable, make an order that the costs of proving any document specified in the notice, which shall be proved at the trial to the satisfaction of the judge, or other presiding officer, certified by his indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause.

Provided that, if the judge shall think the application unreasonable, he shall indorse the summons accordingly.

Provided also, that the judge may give such time for inquiry or examination of the documents intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit.

If the party required shall consent to the admission, the judge shall order the same to be made.

No costs of proving any written or printed document shall be allowed to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have refused or neglected to make such admission, or the

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judge shall have indorsed upon the summons that he does not think it reasonable to require it.

A judge may make such order as he may think fit respecting the costs of the application, and the costs of the production and inspection; and, in the absence of a special order, the same shall be costs in the cause.

FORM OF NOTICE REFERRED TO.

A.

In the K. B.,
C. P.,
or Exchequer. } *A. B. v. C. D.*

Take notice, that the { plaintiff
defendant } in the cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the { defendant,
plaintiff, } his attorney, or agent at , on , between the hours of ; and that the { defendant
plaintiff } will be required to admit that such of the said documents as are specified to be originals were respectively written, signed or executed as they purport respectively to have been; that such as are specified as copies, are true copies; and such documents as are stated to have been served, sent, or delivered, were so served, sent or delivered respectively; saving all just exceptions to the admissibility of all such documents as evidence in this cause. Dated, &c.

G. H. attorney for { plaintiff
defendant }.

To *E. F.* attorney or agent for { defendant
plaintiff }.

[Here describe the documents; the manner of doing which may be as follows:]

ORIGINALS.

Description of the Documents.	Date.
Deed of Covenant between <i>A. B.</i> and <i>C. D.</i> first part, and <i>E. F.</i> second part - - -	1st Jan. 1828.
Indenture of lease from <i>A. B.</i> to <i>C. D.</i> - - -	1st Feb. 1828.
Indenture of release between <i>A. B. C. D.</i> first part, &c. - - -	2nd Feb. 1828.
Letter, defendant to plaintiff - - -	1st March, 1828.
Policy of insurance on goods by ship <i>Isabella</i> , on voyage from <i>Oporto</i> to <i>London</i> - - -	3d. Dec. 1827.
Memorandum of agreement between <i>C. D.</i> captain of said ship, and <i>E. F.</i> - - -	1st Jan. 1828.
Bill of exchange for 100 <i>l.</i> , at three months, drawn by <i>A. B.</i> on, and accepted by <i>C. D.</i> indorsed by <i>E. F.</i> and <i>G. H.</i> - - -	1st May, 1829.

COPIES.

Description of Documents.	Date.	Original or Duplicate served, sent, or delivered, when, how, and by whom.
Register of baptism of A. B. in the parish of X.	1st Jan. 1808.	
Letter, plaintiff to defendant - - - -	1st Feb. 1828.	{ Sent by General Post, 2d February, 1828. Served 2d March, 1828, on defendant's attorney, by F. F., of .
Notice to produce papers	1st March, 1828.	
Record of a judgment of the Court of King's Bench, in an action, J. S. v. J. N.	Trinity term, 10 G. 4.	
Letters patent of King Charles II. in the Rolls Chapel	1st Jan. 1680.	

PLEADING.

Hilary Term, 4 W. 4.—R. 2.

WHEREAS it is provided by the statute 3 & 4 W. 4., c. 42., s. 1., that the judges of the superior courts of common law at *Westminster*, or any eight or more of them, of whom the chiefs of each of the said courts should be three, should and might, by any rule or order to be from time to time by them made, in term or vacation, at any time within five years from the time when the said act should take effect, make such alterations in the mode of pleading in the said courts, and in the mode of entering and transcribing pleadings, judgments, and other proceedings in actions at law, and such regulations as to the payment of costs, and otherwise, for carrying into effect the said alterations, as to them might seem expedient, which rules, orders, and regulations were to be laid before both houses of parliament, as therein mentioned, and were not to have effect until six weeks after the same should have been so laid before both houses of parliament, but after that time should be binding and obligatory on the said courts, and all other courts of common law, and be of the like force and effect as if the provisions contained therein had been expressly enacted by parliament.

Provided that no such rule or order should have the effect of depriving any person of the power of pleading the general issue, and of

giving the special matter in evidence in any case wherein he then was, or thereafter should be entitled so to do by virtue of any act of parliament then or thereafter to be in force :

It is therefore ordered, that from and after the first day of *Easter* term next inclusive, unless parliament shall in the mean time otherwise enact, the following rules and regulations made pursuant to the said statute, shall be in force :—

GENERAL RULES AND REGULATIONS.

1. Every pleading, as well as the declaration, shall be entitled of the day of the month and year when the same was pleaded, and shall bear no other time or date, and every declaration and other pleading shall also be entered on the record made up for trial, and on the judgment roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the Court or a judge.

2. No entry of continuances by way of imparlance, *cursu advisari vult*, *vicecomes non misit breve*, or otherwise, shall be made upon any record or roll whatever, or in the pleadings, except the *jurata ponitur in respectu*, which is to be retained.

Provided that such regulation shall not alter or affect any existing rules of practice as to the times of proceeding in the cause.

Provided also, that in all cases in which a plea *prois darris continuance*, is now by law pleadable in *Banc* or at *Nisi Prius*, the same defence may be pleaded, with an allegation that the matter arose after the last pleading, or the issuing of the jury process, as the case may be.

Provided also, that no such plea shall be allowed, unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such plea, or unless the Court or judge shall otherwise order.

3. All judgments, whether introductory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day.

Provided that it shall be competent for the Court or a judge to order a judgment to be entered *nunc pro tunc*.

4. No entry shall be made on record of any warrants of attorney to sue or defend.

5. And whereas by the mode of pleading hereinafter prescribed, the several disputed facts material to the merits of the case will, before the trial, be brought to the notice of the respective parties more distinctly than heretofore, and by the said act of the 3 & 4 W. 4. c. 42. s. 23, the powers of amendment at the trial, in cases of variance, in particulars not material to the merits of the case, are greatly enlarged :

Several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each ; nor shall several pleas, or avowries, or cognizances, be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each.

Therefore, counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed.

Ex. gr.—Counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed, for they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract.

So counts for not giving or delivering or accepting a bill of exchange in payment, according to the contract of sale, for goods sold and delivered, and for the price of the same goods to be paid in money, are not to be allowed.

So counts for not accepting and paying for goods sold, and for the price of the same goods, as goods bargained and sold, are not to be allowed.

But counts upon a bill of exchange, or promissory note, and for the consideration of the bill or note in goods, money, or otherwise, are to be considered as founded on distinct subject-matters of complaint, for the debt and the security are different contracts; and such counts are to be allowed.

Two counts upon the same policy of insurance are not to be allowed.

But a count upon a policy of insurance and a count for money had and received, to recover back the premium, upon a contract implied by law, are to be allowed.

Two counts on the same charter-party are not to be allowed.

But a count for freight upon a charter-party, and for freight *pro rata itineris*, upon a contract implied by law are to be allowed.

Counts upon a demise, and for use and occupation of the same land, for the same time, are not to be allowed.

In actions of tort for misfeasance several counts for the same injury, varying the description of it, are not to be allowed.

In the like actions for nonfeasance, several counts founded on varied statements of the same duty, are not to be allowed.

Several counts in trespass for acts committed at the same time and place, are not to be allowed.

Where several debts are alleged, in *indebitatus assumpsit*, to be due in respect of several matters; *ex. gr.* for wages, work, and labour, as a hired servant, work and labour generally, goods sold and delivered, goods bargained and sold, money lent, money paid, money had and received, and the like, the statement of each debt is to be considered as amounting to a several count, within the meaning of the rule which forbids the use of several counts, though one promise to pay only is alleged in consideration of all the debts.

Provided that a count for money due on an account stated may be joined with any other count for a money demand, though it may not be intended to establish a distinct subject-matter of complaint in respect of each of such counts.

The rule which forbids the use of several counts is not to be considered as precluding the plaintiff from alleging more breaches than one of the same contract, in the same court.

Ex. gr.—Pleas, avowries, and cognizances, founded on one and the same principal matter, but varied in statement, description, or circumstances only (and pleas in bar, in *replevin*, are within the rule), are not to be allowed.

Ex. gr.—Pleas of *solvit ad diem*, and of *solvit post diem*, are both

pleas of payment, varied in the circumstance of time only, and are not to be allowed.

But pleas of payment, and of accord and satisfaction, or of release, are distinct, and are to be allowed.

Pleas of an agreement to accept the security of *A. B.* in discharge of the plaintiff's demand, and of an agreement to accept the security of *C. D.* for the like purpose, are also distinct and to be allowed.

But pleas of an agreement to accept the security of a third person in discharge of the plaintiff's demand, and of the same agreement, describing it to be an agreement to forbear for a time, in consideration of the same security, are not distinct; for they are only variations in the statement of one and the same agreement, whether more or less extensive, in consideration of the same security, and not to be allowed.

In trespass *quare clausum fregit*, pleas of soil and freehold of the defendant in the *locus in quo*, and of the defendant's right to an easement there; pleas of right of way, of common of pasture, of common of turbary, and of common of estovers, are distinct and are to be allowed.

But pleas of right of common at all times of the year, and of such right at particular times, or in a qualified manner, are not to be allowed.

So pleas of a right of way over the *locus in quo*, varying the *termini* or the purposes, are not to be allowed.

Avowries for distress for rent, and for distress for damage feasant, are to be allowed.

But avowries for distress for rent, varying the amount of rent reserved, or the times at which the rent is payable, are not to be allowed.

The examples, in this and other places specified, are given as some instances only of the application of the rules to which they relate; but the principles contained in the rules are not to be considered as restricted by the examples specified.

6. Where more than one count, plea, avowry, or cognizance shall have been used, in apparent violation of the preceding rule, the opposite party shall be at liberty to apply to a Judge, suggesting that two or more of the counts, pleas, avowries, or cognizances are founded on the same subject-matter of complaint, or ground of answer or defence, for an order that all the counts, pleas, avowries, or cognizances introduced in violation of the rule to be struck out at the cost of the party pleading: whereupon the Judge shall order accordingly, unless he shall be satisfied, upon cause shewn, that some distinct subject-matter of complaint is *bonâ fide* intended to be established in respect of each of such counts, or some distinct ground of answer or defence in respect of each of such pleas, avowries, or cognizances, in which case he shall indorse upon the summons, or state in his order, as the case may be, that he is so satisfied; and shall also specify the counts, pleas, avowries, or cognizances mentioned in such application which shall be allowed.

7. Upon the trial, where there is more than one count, plea, avowry, or cognizance upon the record, and the party pleading fails to establish a distinct subject-matter of complaint in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance, a verdict and judgment shall pass against him upon each

count, plea, avowry, or cognizance, which he shall have so failed to establish, and he shall be liable to the other party for all the costs occasioned by such count, plea, avowry, or cognizance, including those of the evidence, as well as those of the pleadings; and, further, in all cases in which an application to a Judge has been made under the preceding rule, and any count, plea, avowry, or cognizance allowed as aforesaid, upon the ground that some distinct subject-matter of complaint was *bonâ fide* intended to be established at the trial in respect of each count so allowed, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance so allowed, if the Court or Judge, before whom the trial is had, shall be of opinion that no such distinct subject-matter of complaint was *bonâ fide* intended to be established in respect of each count so allowed, or no such distinct ground of answer or defence in respect of each plea, avowry, or cognizance so allowed, and shall so certify before final judgment, such party so pleading shall not recover any costs upon the issue or issues upon which he succeeds, arising out of any count, plea, avowry, or cognizance with respect to which the Judge shall so certify.

8. The name of a county shall, in all cases, be stated in the margin of a declaration, and shall be taken to be the *venue* intended by the plaintiff; and no *venue* shall be stated in the body of the declaration, or in any subsequent pleading.

Provided that, in cases where local description is now required, such local description shall be given.

9. In a plea, or subsequent pleading, intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of *actionem non*, or to the like effect, or any prayer of judgment; nor shall it be necessary, in any replication or subsequent pleading, intended to be pleaded in maintenance of the whole action, to use any allegation of "*precludi non*," or to the like effect, or any prayer of judgment; and all pleas, replications, and subsequent pleadings, pleaded without such formal parts as aforesaid, shall be taken, unless otherwise expressed, as pleaded respectively in bar of the whole action, or in maintenance of the whole action. Provided that nothing herein contained shall extend to cases where an *estoppel* is pleaded.

10. No formal defence shall be required in a plea, and it shall commence as follows:—"The said defendant, by
his attorney, 'or in person,' &c.] says that."

11. It shall not be necessary to state, in a second or other plea or avowry, that it is pleaded by leave of the Court, or according to the form of the statute, or to that effect.

12. No protestation shall hereafter be made in any pleading; but either party shall be entitled to the same advantage in that or other actions, as if a protestation had been made.

13. All special traverses, or traverses with an inducement of affirmative matter, shall conclude to the country.

Provided that this regulation shall not preclude the opposite party from pleading over to the inducement, when the traverse is immaterial.

14. The form of a demurrer shall be as follows:—"The said defendant, by
his attorney [or, 'in person, &c., or 'plaintiff,'] says, that the declaration [or, 'plea,' &c.] is not sufficient in law," shewing the special cause of demurrer, if any.

The form of a joinder in demurrer shall be as follows : — " The said plaintiff [or, 'defendant,'] says, that the declaration [or, 'plea,' &c.] is sufficient in law."

15. The entry of proceedings on the record for trial, or on the judgment roll (according to the nature of the case) shall be taken to be, and shall be in fact, the first entry of the proceedings in the cause, or of any part thereof, upon record, and no fees shall be payable in respect of any prior entry made, or supposed to be made, on any roll or record whatever.

16. No fees shall be charged in respect of more than one issue by any of the officers of the Court, or of any Judge at the assizes, or any other officer, in any action of assumpsit, or in any action of debt on simple contract, or in any action on the case.

17. This rule is repealed ; see *R. G. T. T. 1 Vict. post.*

18. No rule or Judge's order to pay money into Court shall be necessary, except under the 3 & 4 *W. 4. c. 42. s. 21.*, but the money shall be paid to the proper officer of each court, who shall give a receipt for the amount in the margin of the plea, and the said sum shall be paid out to the plaintiff on demand.

19. This rule is repealed ; see *R. G. T. T. 1 Vict. post.*

20. In all cases under the 3 & 4 *W. 4. c. 42. s. 10.*, in which, after a plea in abatement of the non-joinder of another person, the plaintiff shall, without having proceeded to trial on an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, the commencement of the declaration shall be in the following form : —

" (*Venue*) *A. B.*, by *E. F.*, his attorney [or, 'in his own proper person,' &c.], complains of *C. D.* and *G. H.*, who have been summoned to answer the said *A. B.*, and which the said *C. D.* has heretofore pleaded in abatement the non-joinder of the said *G. H.*," &c. [the same form to be used, *mutatis mutandis*, in cases of arrest or detainer.]

21. In all actions by and against assignees of a bankrupt or insolvent or executors or administrators, or persons authorised by act of parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered as in issue, unless specially denied.

PLEADINGS IN PARTICULAR ACTIONS.

I. Assumpsit.

1. In all actions of assumpsit, except on bills of exchange and promissory notes, the plea of non-assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law.

Ex. gr. — In an action on a warranty, the plea will operate as denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach ; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk of the loss, or of the alleged compliance with warranties,

In actions against carriers and other bailees, for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach.

In an action of *indebitatus assumpsit* for goods sold and delivered, the plea of *non-assumpsit* will operate as a denial of the sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.

2. In all actions upon bills of exchange and promissory notes, the plea of *non-assumpsit* shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; *ex. gr.*, the drawing or making, or indorsing, or accepting or presenting, or notice of dishonour of the bill or note.

3. In every species of *assumpsit*, all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded. *Ex. gr.* Infancy — coverture — release — payment — performance — illegality of consideration, either by statute or common law — drawing, indorsing, accepting, &c., bills or notes by way of accommodation — set-off — mutual credit — unseaworthiness — misrepresentation — concealment — deviation — and various other defences, must be pleaded.

4. In actions on policies of assurance the interest of the assured may be averred thus: — “That A., B., C., and D., or some or one of them, were or was interested,” &c.; and it may also be averred, that the insurance was made for the use and benefit, and on the account of the person or persons so interested.

II. In Covenant and Debt.

1. In debt on specialty or covenant, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only; and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

2. The plea of *nil debet* shall not be allowed in any action.

3. In actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that “he never was indebted in manner and form as in the declaration alleged;” and such plea shall have the same operation as the plea of *non-assumpsit* in *indebitatus assumpsit*: and all matters in confession and avoidance shall be pleaded specially, as above directed in actions of *assumpsit*.

4. In other actions of debt in which the plea of *nil debet* has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance.

III. *Detinere.*

The plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial shall be admissible under that plea.

IV. *In Case.*

1. In actions on the case, the plea of Not guilty shall operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration. *Ex. gr.*—In an action on the case for a nuisance to the occupation of a house, by carrying on an offensive trade, the plea of Not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house. In an action on the case for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way; and, in an action for converting the plaintiff's goods, the conversion only, and not the plaintiff's title to the goods. In an action of slander of the plaintiff, in his office, profession, or trade, the plea of Not guilty will operate to the same extent precisely as at present, in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff's holding the office, or being of the profession or trade alleged. In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings. In this form of action against a carrier, the plea of Not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

2. All matters in confession and avoidance shall be pleaded specially, as in actions of *assumpsit*.

V. *In Trespass.*

1. In actions of trespass *quare clausum fregit*, the close or place in which, &c. must be designated in the declaration by name or abutments, or other description; in failure whereof the defendant may demur.

2. In actions of trespass *quare clausum fregit*, the plea of Not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which, if intended to be denied, must be traversed specially.

3. In actions of trespass *de bonis asportatis*, the plea of Not guilty shall operate as a denial of the defendant having committed the trespass alleged, by taking or damaging the goods mentioned, but not of the plaintiff's property therein.

4. Where, in an action of trespass *quare clausum fregit*, the defendant pleads a right of way with carriages and cattle, and on foot, in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if a right of way with cattle or on foot only shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found, and for the plaintiff in respect of such of the trespasses as shall not be so justified.

5. And where, in an action of trespass *quare clausum fregit*, the defendant pleads a right of common of pasture for divers kinds of cattle — *ex. gr.* horses, sheep, oxen, and cows, — and issue is taken thereon, if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of common so found, and for the plaintiff in respect of the trespasses which shall not be so justified.

6. And in all actions in which such right of way or common as aforesaid, or other similar right is so pleaded, that the allegations as to the extent of the right are capable of being construed distributively, shall be taken distributively.

Provided nevertheless, that nothing contained in the fifth, sixth, or seventh of the above-mentioned general rules and regulations, or in any of the above-mentioned rules or regulations relating to pleading in particular actions; shall apply to any case in which the declaration shall bear date before the first day of Easter Term next.

REGULÆ GENERALES.

Trinity Term, 1 Victoria.

AMENDMENT OF PLEADING RULES.

Whereas it is expedient that certain rules and regulations made in Hilary Term, in the fourth year of his late Majesty King William the Fourth, pursuant to the statute of the 3 & 4 W. 4. c. 42. s. 1. should be amended, and some further rules and regulations made pursuant to the same statute:

It is therefore ordered, that from and after the first day of Michaelmas Term next inclusive, unless parliament shall in the mean time otherwise enact, the following rules and regulations, made pursuant to the said statute, shall be in force:—

1st. It is ordered, that the 17th and 19th of the General Rules and Regulations made pursuant to the statute 3 & 4 W. 4. c. 42. s. 1. be repealed, and that in the place thereof the two following amended rules be substituted; viz. —

Payment of money into court. When money is paid into court, such payment shall be pleaded in all cases, and as near as may be in the following form, *verbalis tenore*,

FOR THE NINETEENTH RULE.

General Issue by Statute.] It is further ordered, that in every case in which a defendant shall plead the general issue, intending to give the special matter in evidence by virtue of any act of parliament, he shall insert in the margin of the plea the words "by statute," otherwise such plea shall be taken not to have been pleaded by virtue of any act of parliament; and such memorandum shall be inserted in the margin of the issue and of the Nisi Prius record.

Payments credited in particulars of demand need not be pleaded.] In any case in which the plaintiff (in order to avoid the expense of a plea of payment) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, it shall not be necessary for the defendant to plead the payment of such sum or sums of money.

Rule not to apply to claim of balance.] But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand states that he seeks to recover a certain balance, without giving credit for any particular sum or sums.

Payment in reduction of damages or debt not to be allowed.] Payment shall not, in any case, be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar.

APPENDIX. —No. II.

Bill of Exceptions.

SEPARATE from the record, as to the effect of evidence, in K. B. (Tidd's Forms, 373. 5th edit.)

— to wit. Be it remembered, that in the term of — in the — year of the reign of our sovereign lord George the Third, now king of the united kingdom of Great Britain and Ireland, &c. came A. B. by — his attorney, into the court of our said lord the king before the king himself at Westminster, and impleaded C. D. in a certain plea of trespass on the case upon promises; on which the said A. B. declared against him that, &c. (*set out the declaration and other pleadings, and proceed as follows:*) And thereupon issue was joined between the said A. B. and the said C. D. And afterwards, to wit, at the sittings of *nisi prius*, holden at the Guildhall of the city of London aforesaid, in and for the said city, on — the — day of — in the — year of the reign of our said lord the king, before the right honourable Edward Lord Ellenborough, chief justice of our said lord the king, assigned to hold pleas in the court of our said lord the king before the king himself, Edward Law, Esquire, being associated unto the said chief justice, according to the form of the statute in such case made and provided, the aforesaid issue so joined between the said parties as aforesaid, came on to be tried by a jury of the city of London aforesaid, for that purpose duly impanelled, that is to say, E. F. of — and G. H. of —, &c. (*names and additions of jury*), good and lawful men of the said city of London: at which day, came there as well the said A. B. as the said C. D. by their respective attorneys aforesaid; and the jurors of the jury aforesaid, impanelled to try the said issue, being called, also came, and were then and there in due manner chosen and sworn to try the same issue; and upon the trial of that issue, the counsel learned in the law for the said A. B., to maintain and prove the said issue on his part, gave in evidence that, &c. (*here set out the evidence on the part of the plaintiff, and afterwards that on the part of the defendant, and then proceed as follows:*) Whereupon the said counsel for the said C. D. did then and there insist before the said chief justice, on the

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the said several matters so produced and of the said C. D. as aforesaid, were submitted and allowed as evidence, to entitle the said A. B. to a verdict in this cause, and to bar the said A. B. of his action aforesaid; and the said C. D. did then and there pray the said A. B. to be evidence in favour of the said C. D. to a verdict in this cause, and to bar the said A. B. of his action aforesaid: But to this the counsel learned in the law of the said A. B. did then and there insist, before the said chief justice, that the said matters were not sufficient, nor ought to be admitted or allowed to the said C. D. to a verdict, or to bar the said A. B. of his action aforesaid; and the said chief justice did then and there declare and deliver his opinion to the jury aforesaid, that the said several matters so produced and given in evidence on the part of the said C. D. were not sufficient to bar the said A. B. of his action aforesaid, and with that direction left the same to the said jury; and the jury aforesaid then and there gave their verdict for the said A. B. and £ — damages; whereupon the said counsel for the said C. D. did then and there, on the behalf of the said C. D., except to the aforesaid opinion of the said chief justice, and insisted on the said several matters, as an absolute bar to the said action: And inasmuch as the said several matters so produced and given in evidence on the part of the said C. D. and by his counsel aforesaid objected and insisted on as a bar to the action aforesaid, do not appear by the record of the verdict aforesaid, the said counsel for the said C. D. did then and there propose their aforesaid exception to the opinion of the said chief justice, and requested him to put his seal to this bill of exceptions, containing the said several matters so produced and given in evidence on the part of the said C. D. as aforesaid, according to the form of the statute in such case made and provided: And thereupon the said chief justice, at the request of the said counsel for the said C. D., did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, on the said — day of — in the — year of the reign of his present Majesty.

Bill of exceptions to be tacked to the record, as to a witness's being bound to answer a question tending to disgrace him, in K. B. (Tidd's Forms, 375.)

After the end of the issue, and award of the venire facias, proceed as follows:

Which said issue, in form aforesaid joined between the said parties, afterwards, to wit, at the sittings of *nisi prius*, holden at *Westminster Hall*, in and for the county of *Middlesex*, on — the — day of —, in the — year of the reign of our lord the now king, before the right honourable *Edward Lord Ellenborough*, chief justice of our said lord the king, assigned to hold pleas in the court of our said lord the king before the king himself, *Edward Law*, Esquire, being associated unto the said chief justice, according to the form of the statute in such case made and provided, came on to be tried by a jury of the said county of *Middlesex*, for that purpose duly impanelled. At which day came there

the said *A. B.* as the said *C. D.* by their respective attornies said; and the jurors of the jury aforesaid, impanelled to try the said issue, being called, also came, and were then and there in due manner chosen and sworn to try the said issue: And upon the trial of that issue, one *E. F.* was produced and examined upon oath as a witness, by the counsel learned in the law for the said *A. B.* in support of the said action; and upon the cross-examination of the said *E. F.* by the counsel learned in the law for the said *C. D.* the said *E. F.* was asked by the said last-mentioned counsel whether he had not been imprisoned, upon a conviction for forging a coal-meter's ticket: Whereupon the said chief justice then and there interposed, and before the said *E. F.* had given any answer to the said question, declared and delivered his opinion, that the said *E. F.* was not bound to answer the said question; and the said *E. F.* thereupon then and there refused to answer the same: And afterwards, at the said trial, the said chief justice in summing up the evidence given in the said cause to the jury aforesaid, did further declare and deliver his opinion to the said jury, that the said *E. F.*'s refusal to answer the said question threw no manner of discredit upon him the said *E. F.*; and the jury aforesaid thereupon then and there gave their verdict for the said *A. B.* and £—— damages: Whereupon the said counsel for the said *C. D.* did then and there on behalf of the said *C. D.* except to the aforesaid opinion of the said chief justice, and insisted that the said *E. F.* was bound to answer the said question, and that his refusal to answer the same was, and ought to be considered by the said jury, as an impeachment of his credit: And inasmuch as the said several matters hereinbefore mentioned do not appear by the record, &c. (*as in the last.*)

APPENDIX. — No. III.

Affidavit to put off trial on account of absence of material witness.
(*Tidd's Forms*, 310.)

In the King's Bench, &c.

A. B. plaintiff,
and

C. D. defendant.

C. D. of —, the defendant in this cause, maketh oath and saith, that issue was joined in this cause, in — term last past, and that notice was given for the trial thereof at the — sitting within (or, at the sittings after) the said term: And this deponent further saith, that *E. F.*, late of —, is a material witness for him this deponent in the said cause, as he is advised and believes, and that he cannot safely proceed to the trial thereof, without the testimony of him the said *E. F.* And this deponent further saith, that in consequence of the notice of trial so given as aforesaid, he this deponent caused an inquiry to be made, &c. (*stating the nature and result of the inquiry made after the witness, and the time when he is likely to attend.*)

Sworn, &c.

C. D.

APPENDIX. — No. IV.

6 & 7 Vict. c. 85.

An Act for improving the Law of Evidence, passed 22d August, 1843.

WHEREAS the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced and on the truth of their testimony: Now therefore be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having, by law or by consent of parties, authority to hear, receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or injury, or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence: provided that this act shall not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively: provided also, that this act shall not repeal any provision in a certain act passed in the session of parliament holden in the seventh year of the reign of his late Majesty, and in the first year of the reign of her present Majesty, intituled "An Act for the Amendment of the Laws with respect to Wills:" provided that in courts of equity any defendant to any cause pending in any such court may be examined as a witness on the behalf of the plaintiff or of any co-defendant in any such cause, saving just exceptions; and that any interest which such defendant so to be examined may have in the matter or any of the matters in question in the cause shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting or tending to affect the credit of such defendant as a witness.

* * * * *

3. And be it enacted, that nothing in this act shall apply to or affect any suit, action, or proceeding brought or commenced before the passing of this act.

4. And be it enacted, that nothing in this act shall extend to Scotland.

A D D E N D A.

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49. *Bingham v. Stanley* is reported in 2 Q. B. 117, and is recognised in *Bonzi v. Stewart*, 4 M. & G. 295.
59. *Cooper v. Blick* is reported in 2 Q. B. 915.
112. Upon an issue on a parish modus under the Tithe Commutation Act, 6 & 7 W. 4. c. 71. s. 46., in which the incumbent was plaintiff, and one of the landowners was the defendant. Wightman J. admitted other landowners and farmers as competent witnesses in support of the modus, though the action had been brought before 6 & 7 Vict. c. 85. came into operation. *Macarthy v. Nepean, Dorchester Spr. As.* 1844.
157. Agreements, chargeable with 1*l.* stamp duty by 55 Geo. 3. c. 184., are now liable to a duty of 2*s.* 6*d.* if stamped within fourteen days after the making. If stamped after that time a penalty of 10*l.* is payable. See 7 Vict. c. 21. s. 5., and Schedule.
165. *Attree v. Anscomb*, 2 M. & S. 88., was overruled by the court of Q. B. in *The Corn Exchange Company v. Gillingham*, H. T. 1843.
183. Where the jury find for the defendant on a special plea, they cannot assess damages contingent on the opinion of the court as to such plea, unless the defendant consents. *Newton v. Harland*, 1 M. & G. 644.
190. The mere introduction of the names of the parties in an agreement, which shews on the face of it that the parties intended to complete it by signature, is not a compliance with the Stat. Frauds. *Hubert v. Traherne*, 3 M. & G. 743.
255. The 2 Geo. 2. c. 23. as to attornies has been repealed, and other provisions substituted, by 6 & 7 Vict. c. 73. s. 37.
375. Where the plaintiff goes into evidence of the falsity of a libellous statement in order to increase damages, the defendant may shew the truth of it, though there is no special plea. *Brcun v. Croome*, 2 Stark. 297.
383. In *Richards v. Richards*, Bodmin Sp. As. 1844, where the slanderous words imputed to the plaintiff that he had been notoriously guilty of an indictable offence, Cresswell J., after

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conferring with Wightman J., admitted proof of rumours publicly current in the neighbourhood of the plaintiff's residence before the uttering of the words in mitigation of damages, though there was no special plea. But the learned judge stated that in *Hardy v. Alexander*, cited in the text, the evidence had been admitted *sub silentio*.

567. The effect of the general issue, where that plea is given by statute, remains exactly the same as before the new rules of pleading, and is not confined to the peculiar matters of defence given by the statute. *Ross v. Clifton*, 11 A. & B. 631.

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THE END.

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